Supreme Court, U.S.
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No. 06-961314

IN THE

Supreme Court of the United States

JMC TELECOM, LLC,

Petitioner,

v.

AT & T CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Third Circuit affirmed summary judgment in AT&T Corp.'s ("AT&T") favor on its breach of tariff complaint against JMC Telecom, LLC ("JMC") and in favor of AT&T on JMC's counterclaim which alleged that AT&T breached the filed tariff when it failed to provide JMC with the exclusive AT&T service specified in AT&T's Filed Tariff #1. The Third Circuit held that JMC's counterclaim related to the quality of AT&T's service and was, therefore, barred by the filed rate doctrine. The Third Circuit's decision conflicts with the Supreme Court's decision in *American Telephone & Telegraph Co. v. Central Office Telephone*, 524 U.S. 214 (1998).

The Third Circuit also affirmed the dismissal, under *Fed. R. Civ. P.* 12(b)(6), of JMC's counterclaim against AT&T which alleged that AT&T committed a *per se* violation of Section 1 of the Sherman Antitrust Act when it horizontally divided customers in the prepaid telephone card market by forcing JMC, its competitor in the sale of telephone cards, to sell only in the maritime market and by reserving to itself the non-maritime market. The Third Circuit held that AT&T and JMC stood in a vertical relationship of manufacturer and distributor because AT&T provided JMC with the telecommunications service that allowed JMC's cards to function, even though JMC alleged that AT&T and JMC marketed against each other and sold different phone cards to the public. The court also held that the division of the market was a unilateral act and that JMC's unwilling participation in the scheme did not constitute concerted action.

The Third Circuit's decision conflicts with the holdings of the Supreme Court, in *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990); *United States v. Topco Assoc.*, 405 U.S. 596 (1972); and *Perma Life Mufflers,-Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968).[1]

Three questions are presented:

1. If a filed tariff states that a carrier will provide its customer with a specified brand of service but the carrier thereafter provides an inferior brand of service, is the customer's claim for breach of tariff barred because the filed rate doctrine excludes claims of insufficient or poor-quality service?

2. Does the Supreme Court's rule that declares a naked restraint of trade in the form of a division of markets between competitors to be a *per se* violation of the antitrust laws apply where one of the competitors supplies a component of the other's product?

3. Does a counterclaim state a claim of concerted action under Section 1 of the Sherman Act if it alleges that the counterclaim defendant demanded that the counterclaimant, its competitor, divide the market for both firm's products and the counterclaimant unwillingly agreed?

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[1] The Third Circuit never reached the question whether the filing and serving of JMC's complaint against AT&T was sufficient written notice by JMC under the filed tariff that JMC disputed AT&T's charges. The court appears to have held that since JMC's defenses are barred by the filed rate doctrine, the notice issue was not material to its decision. App. A at 17a.

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

JMC Telecom, LLC is a California limited liability company. It has no parent corporation and no publicly held company has any ownership interest in JMC Telecom, LLC.

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STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Third Circuit's opinion was rendered on December 1, 2006. The Petition for Panel Rehearing with Suggestion for Rehearing *En Banc* was denied on January 3, 2007. App. F.

STATUTORY PROVISIONS INVOLVED

The provisions of 15 U.S.C. §§ 1, 15(a), 26 and 47 U.S.C. §§ 152 and 414 are lengthy and are, therefore, set out in App. G, pursuant to *Supreme Court Rule* 14.1(f).

STATEMENT OF THE CASE

1. Petitioner JMC entered into a contract tariff with respondent AT&T to obtain AT&T's telecommunications service for use in connection with JMC's prepaid telephone

cards which were sold primarily to seamen in the maritime industry.

As part of its agreement with AT&T, JMC entered into a Minimum Annual Revenue Commitment ("MARC") committing it to purchase $64,615,405 worth of telecommunications services from AT&T over a three year period for use in connection with JMC's phone cards.

It was critical to JMC's decision to enter into the agreement with AT&T that JMC's prepaid card calls would be carried over *AT&T's* telecommunications facilities. AT&T's representatives repeatedly assured JMC that would be the case and AT&T's filed Tariff #1 stated that "the Customer [JMC] may inform its subscribers that calls .. . will be carried over *AT&T's facilities.*" (Emphasis added.)[2] Tariff #1 was incorporated by reference into the contract tariff.

Contrary to the tariff, and unbeknownst to JMC, AT&T did not provide JMC's phone cards with service over AT&T's facilities, but instead used a substandard carrier called Pacific Gateway Exchange ("PGE") to carry JMC's customers' calls. JMC's customers immediately experienced problems connecting their overseas calls, particularly calls to the Philippines, which was the most important call destination for JMC's customers.

AT&T knew that 6 of 7 calls to the Philippines placed over PGE's facilities would fail to connect and, after repeated

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[2] The District Court did not address this term of the tariff in its decision although JMC had raised it. The Third Circuit did address it but held that since the claim related to "quality of service," it was barred by the filed rate doctrine. App. A at 16a. *See* I, *infra.*

complaints by JMC, AT&T conducted a test of service to the Philippines over PGE's facilities with the result that not one call connected.

As a result of JMC's customers' inability to connect calls, JMC's sales rapidly declined and JMC went out of business.

2. Because JMC was unable to meet the MARC's revenue requirements, AT&T sued JMC for breach of tariff in the District of New Jersey. JMC sued AT&T in the Eastern District of New York, pursuant to the forum selection clause AT&T wrote into the contract tariff. Both cases were eventually sited in the District of New Jersey where JMC's claims were asserted as counterclaims in AT&T's action.

3. JMC's counterclaim alleged that AT&T breached the contract tariff with JMC when AT&T agreed to provide service over AT&T's facilities but instead used PGE's facilities.

4. JMC also alleged that AT&T combined with JMC to restrict JMC's sale of its phone cards to the maritime market and to reserve the non-maritime market for the sale of its own cards, resulting in a horizontal division of customers, a *per se* violation of Section 1 of the Sherman Act.[3] Previously, AT&T had marketed and sold its own prepaid card in competition with JMC's card in the marketplace generally. JMC unwillingly agreed to AT&T's demand to divide the market because it needed to remain in good standing with AT&T in order to be able to meet the substantial purchase commitment in the MARC.

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[3] The maritime market involved the sale of phone cards to itinerant seamen, primarily through ships' chandlers.

5. AT&T filed a motion to dismiss JMC's antitrust – and other – counterclaims under *Fed. R. Civ. P.* 12(b)(6). On March 21, 2003, the District Court granted AT&T's motion, *finding* that, despite JMC's averment that AT&T and JMC had competed against each other at the same level, AT&T and JMC stood in a relationship of manufacturer and distributor and the division of the market was not, therefore, a horizontal restraint subject to *per se* treatment. App. E at 58a-62a. The District Court also held that the arrangement between AT&T and JMC to divide the market "constituted a unilateral act and, therefore, did not violate § 1." App. E at 58a.

6. AT&T later filed a motion for summary judgment seeking a dismissal of JMC's remaining counterclaims which alleged that AT&T had breached the contract tariff with JMC and also sought summary judgment on its complaint against JMC for breach of the MARC.

7. With respect to JMC's claim for breach of tariff, the district court found that it was barred by the filed rate doctrine because AT&T's tariff did not promise any particular level of performance. App. C at 32a-33a.

8. The district court also granted AT&T summary judgment on its complaint because, according to the court, JMC did not dispute AT&T's bill in writing within the time specified in Tariff #1, after which, according to the tariff, the bill became incontestible. The court did not credit JMC's argument that the filing and serving of its complaint against AT&T in the Eastern District of New York – within the prescribed time period – wherein JMC alleged that AT&T had breached its agreement and JMC owed AT&T nothing,

was not sufficient notice that JMC disputed AT&T's charges. App. C at 39a-40a.[4]

9. The court entered judgment in AT&T's favor and against JMC for $10,743,885. The final judgment was entered on December 29, 2004. App. D.

10. On January 26, 2005, JMC filed its Notice of Appeal of the order of March 21, 2003 and the order and judgment of December 29, 2004. The Third Circuit's decision and judgment were entered on December 1, 2006. App. A and B. Petitioner timely filed its Petition for Panel Rehearing and Suggestion for Rehearing *En Banc* on December 15, 2006. On January 3, 2007, the Third Circuit denied the Petition for Panel Rehearing and Suggestion for Rehearing *En Banc*. App. F.

STATEMENT OF JURISDICTION

Subject matter jurisdiction in the District Court was conferred by 28 U.S.C. §§ 1331, 1332 (a), (c), and 1337(a), 15 U.S.C. §§ 15 and 26. Supplemental jurisdiction was conferred by 28 U.S.C. § 1367.

[4] See p.ii n.1, *supra.*

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE THIRD CIRCUIT'S DECISION AND THE SUPREME COURT'S DECISION IN *AMERICAN TELEPHONE AND TELEGRAPH CO. v. CENTRAL OFFICE TELEPHONE, INC.*

Whether a telecommunications carrier's failure to deliver the specific brand of service called for in a filed tariff is unenforceable because the customer's claim relates to the quality of service is an important question because it undermines the filed rate doctrine and conflicts with the Supreme Court's decision in *American Telephone and Telegraph Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998). While purporting to rely upon *Central Office,* the Third Circuit's decision conflicts with that decision because JMC sought to *enforce* the tariff's term that service would be provided only over AT&T's facilities and *not* to challenge that term.

The Third Circuit's decision stands alone among the Circuits in holding that a carrier is immune when it fails to provide the service specified in the tariff because the customer's complaint relates to the quality of service. App. A at 16a. This holding will, if not corrected, stand the filed rate doctrine on its head and permit any carrier to breach tariff terms that are not strictly rate-related on the ground that the customer's subsequent complaint will be about quality and therefore unenforceable. The Third Circuit's holding will result in harm that is the mirror image of that which *Central Office* intended to prevent: whereas, *Central Office* does not allow a carrier to provide more or better

service than a tariff requires because that would be tantamount to an impermissible reduction in the tariffed rate to the customer, the Third Circuit's decision permits a carrier to provide a lesser level of service than that stated in the tariff, which is tantamount to an increase in the tariffed rate to the customer.

The Supreme Court's decision in *Central Office* prohibits a customer from claiming that a carrier promised a level of service other than that specified in the tariff. *Central Office*, 524 U.S. at 223-24. The Third Circuit, on the other hand, has interpreted *Central Office* to prohibit any claim relating to the level of service, even if the service provided by the carrier is different than the service specifically promised in the tariff.

JMC submits that this dichotomy in the filed rate doctrine created by the Third Circuit will, if not corrected, undermine the very purpose of the filed rate doctrine, which is to insure equal, non-discriminatory treatment.

II. REVIEW IS WARRANTED TO RESOLVE A CONFLICT BETWEEN THE THIRD CIRCUIT AND THE SUPREME COURT CONCERNING WHETHER AN AGREEMENT BY COMPETITORS TO NAKEDLY RESTRAIN TRADE BY HORIZONTALLY DIVIDING MARKETS IS NOT A *PER SE* VIOLATION OF THE SHERMAN ACT BECAUSE ONE OF THE PARTIES TO THE AGREEMENT SUPPLIES A COMPONENT OF THE OTHER'S PRODUCT AND WHETHER FORCING A COMPETITOR TO DIVIDE A MARKET IS NOT CONCERTED ACTION UNDER SECTION 1 OF THE SHERMAN ACT.

It has consistently been held that an agreement by competitors at the same level to divide customers and markets between themselves is a *per se* violation of Section 1 of the Sherman Antitrust Act. *See e.g., United States v. Topco Assoc.*, 405 U.S. at 608; *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). In a case analogous to this one, the Supreme Court held that the reservation of one market for one competitor and another for the other competitor was a *per se* violation, even if the firms never actually competed in the same market. *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990). Where, as here, the parties actually competed against each other in the same market, *Palmer* should apply with greater force.

The following allegations were made in JMC's counterclaim against AT&T:

- "AT&T was a major competitor of JMC in the marketing and sale of prepaid calling cards";

- "AT&T prohibited JMC from selling its Rring Latitude Card to non-maritime industry customers";

- "AT&T limited JMC's customers and markets";

- "JMC was confined to maritime distributors in the maritime industry";

- "AT&T prohibited JMC from selling its Rring Latitude Card to non-maritime industry customers";

- "JMC was an unwilling participant in the combination in which AT&T unreasonably restrained trade in the prepaid calling card industry, thereby injuring JMC and consumers who would have benefitted from increased competition"; and

- "AT&T's actions were intended to eliminate JMC as a competitor and to unreasonably restrain trade in the prepaid calling card market."

A. THE THIRD CIRCUIT'S DECISION IS CONTRARY TO THE DECISIONS OF THE SUPREME COURT WHICH HOLD THAT AN AGREEMENT BY COMPETITORS AT THE SAME LEVEL TO DIVIDE MARKETS OR CUSTOMERS IS A *PER SE* VIOLATION OF SECTION 1 OF THE SHERMAN ACT.

The Third Circuit found that because AT&T provided the telecommunications service for JMC's phone cards, AT&T and JMC stood in a relationship of supplier and distributor and, therefore, the agreement to divide markets between maritime and non-maritime customers was, according to the court, "primarily vertical," not horizontal, and could not, therefore, be a *per se* violation of the Sherman Act. App. A at 8a-9a.

The lower courts considered that since a component of JMC's product – the telecommunications service – was supplied by AT&T, the relationship of the two firms was necessarily vertical (*i.e.*, equivalent to that of manufacturer and distributor). JMC was not, however, a distributor of AT&T's phone card. Rather, AT&T and JMC each sold a different phone card in the same market. JMC was the manufacturer and seller of a phone card that happened to use – or at least was supposed to use – AT&T's telecommunications service.

The Third Circuit found, contrary to the averments in JMC's counterclaim, that the relationship was "primarily vertical" because, according to the court, AT&T "supplied telecommunications service to JMC for resale." App. A at 8a-9a. JMC was not a distributor of AT&T's telecommunications service under the antitrust laws any more

than Boeing is a distributor of the General Electric jet engines or Goodyear tires that are incorporated into its final products. Likewise, JMC was no more a distributor of AT&T's service than are those firms that use BASF's products to make their products better.[5] JMC sold its own phone card, not AT&T's.

The Third Circuit's decision that dividing up the market between AT&T and JMC did not effect a horizontal restraint of trade is contrary to the Supreme Court's decision in *Palmer v. BRG of Georgia, Inc., supra.* App. A at 7a-8a. The parties in *Palmer* competed against each other in Georgia. The larger firm, with a nationwide market, decided independently to leave the Georgia market and offered the smaller firm a license to use the larger firm's trademarks in Georgia. The agreement provided that the larger firm would not reenter the Georgia market and the smaller firm agreed not to market in the larger firm's other geographic markets. The Supreme Court struck down the arrangement as a *per se* violation of Section 1 of the Sherman Act.

The result in this case also conflicts with the decisions of the Supreme Court which recognize that "'horizontal territorial limitations ... are naked restraints of trade with no purpose except stifling of competition.' ... Such limitations are *per se* violations of the Sherman Act." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. at 768. In this case, the division of customers was "a naked restraint" in which AT&T and JMC agreed not to compete in

[5] BASF is a chemical company whose products are used in many products made by other firms. BASF's famous advertising slogan is: "We don't make a lot of the products you buy. We make a lot of the products you buy better."® Service over AT&T's facilities was only one component of JMC's phone card that was supposed to make JMC's product better, it was not, however, the product.

the other's territory. It is indistinguishable from the market division that was condemned in *Palmer*. *Palmer*, 498 U.S. at 49-50.

On AT&T's Rule 12(b)(6) motion, the District Court dismissed JMC's antitrust claim – and the Third Circuit affirmed – on the ground that the division of the market was "primarily vertical" and subject, therefore, to rule of reason analysis. App. A at 8a-9a. In *Palmer*, the lower courts had ruled similarly, but the Supreme Court reversed, citing *United States v. Topco Assocs.* 405 U.S. 596 (1972), and held that the market division was a *per se* illegal horizontal restraint. *Palmer*, 498 U.S. at 49-50.

The Third Circuit has essentially held that direct competitors may act in concert to horizontally divide markets and customers between themselves and that will not receive *per se* condemnation if there is an aspect of the parties' relationship that is vertical in nature. The court mistakenly relied upon *Electronics Communications Corp. v. Toshiba America Consumer Products, Inc.* in so holding. See II. B., *infra.*

JMC submits that the Third Circuit employed overly restrictive principles and analysis in concluding that an otherwise naked restraint of trade resulting from a horizontal division of markets and customers was not a *per se* violation of Section 1 of the Sherman Act. The lower courts should not have held that AT&T's provision of telecommunications service to JMC operated to take the restraint out from under the *per se* test, but should have instead applied settled principles of antitrust law as enunciated by the Supreme Court in *Palmer*, *Topco* and *Perma Life Mufflers, Inc. v. Int'l*

Parts Corp., 392 U.S. 134 (1968) and held that the restraint was a *per se* violation of Section 1 of the Sherman Antitrust Act.

There has been a juridical retreat in recent years from *per se* condemnation of certain trade restraints in favor of rule of reason analysis. This case presents an important question that should be addressed by the Supreme Court because the Third Circuit's decision enunciates a rule of law that will undermine this Court's jurisprudence relating to the application of the *per se* test to naked restraints of trade resulting from agreements to horizontally divide markets and customers. It is respectfully suggested that the Supreme Court should determine whether such restraints will continue to receive *per se* condemnation and, if so, whether the Third Circuit's decision undermines that rule of law and should, therefore, be reversed.

B. THE THIRD CIRCUIT'S HOLDING THAT AT&T ACTED UNILATERALLY IS CONTRARY TO THE SUPREME COURT'S HOLDINGS THAT CONCERTED ACTION OCCURS WHEN ONE FIRM FORCES ANOTHER TO DO THAT WHICH THE SHERMAN ACT CONDEMNS.

JMC alleged that JMC was an "unwilling participant in the combination in which AT&T unreasonably restrained trade in the prepaid calling card industry." AT&T demanded that JMC, its competitor, cease selling its phone cards outside the maritime market so that AT&T could reserve the non-maritime market to itself for its own phone card. JMC was an unwilling participant in that arrangement and the fact that JMC was forced to capitulate to AT&T's demand does not

vitiate concerted action or agreement under the Sherman Act. *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. at 138-40 (the party exerting the force cannot argue that a contract, combination or conspiracy did not exist).

Although the courts below were required on a Rule 12(b)(6) motion to accept as true JMC's averment that AT&T and JMC were direct competitors, they did not, holding instead that "JMC has not alleged action by other distributors in concert with AT&T." App. A at 7a. The lower courts mistakenly relied upon *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), which held that in a "distributor-termination case," there must be a "'contract, combination . . . or conspiracy' between the manufacturers and *other* distributors in order to establish a violation." *Id.* at 761 (emphasis added). That is because a manufacturer and its distributor stand in a classically vertical relationship and a manufacturer may unilaterally decide with whom it will deal, hence the need for an agreement with "other distributors" in order to establish concerted action in the distributor-termination context. That rule should not apply to firms that are direct competitors in the sale of differentiated products.

The Third Circuit also mistakenly relied upon *Electronics Communication Corp. v. Toshiba Amer. Consumer Prods., Inc.*, 129 F.3d 240 (2d Cir. 1997), another case involving a manufacturer and its distributor where the manufacturer terminated the distributor in order to sell directly in the distributor's market.

Toshiba involved intra-brand competition between a manufacturer and its distributor and *Monsanto* involved a manufacturer's unilateral decision to terminate its distributor. Both cases are inapposite. Here, competitors agreed to divide

the market between themselves for the sale of inter-brand products. The governing rules are, rather, those enunciated in *Palmer* and *Perma Life Mufflers*.[6] The Third Circuit's decision conflicts with the Supreme Court's holdings in *Palmer* and *Perma Life Mufflers* in that it failed to recognize the horizontal nature of the restraint and failed to credit JMC's allegation that AT&T and JMC engaged in concerted action when JMC capitulated to AT&T's demand and the two firms divided the market for maritime and non-maritime customers between themselves.

Thus, certiorari is warranted to resolve the conflict between the decisions of the Supreme Court and the Third Circuit's decision that an agreement imposed by one competitor on another to divide a market between them is a unilateral act and does not constitute concerted action resulting in a *per se* violation of Section 1 of the Sherman Antitrust Act.

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[6] The lower courts also applied a stricter standard than is permitted by *Fed. R. Civ. P.* 8 relative to the dismissal of JMC's antitrust counterclaim. On this point, the Third Circuit's decision conflicts with the decision of the Second Circuit in *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), *cert. granted, Bell Atlantic Corp. v. Twombly*, __ U.S. __, 126 S.Ct. 2965, 165 L.Ed.2d 949, 2006 U.S. LEXIS 8375 (U.S., Nov. 6, 2006).

CONCLUSION

For all the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED DECEMBER 1, 2006

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 05-1304

AT & T CORP.

v.

JMC TELECOM, LLC,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
District Court No. 99-cv-02578
District Judge: Hon. Mary Little Cooper

Argued on March 7, 2006

Before: GREENBERG and ROTH*, *Circuit Judges*,
BUCKWALTER**, *District Court Judge.*

OPINION

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* Judge Roth assumed senior status on May 31, 2006.

** Judge Ronald L. Buckwalter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

ROTH, Circuit Judge:

JMC Telecom, L.L.C., was a wholesaler, marketer, and designer of prepaid telephone cards with experience in the maritime market.[1] This appeal arises from a suit for breach of contract brought by AT & T Corporation against JMC. JMC counterclaimed for antitrust, federal common law, and state law violations. The District Court dismissed the antitrust counterclaim and granted summary judgment to AT & T on its contract claims and against JMC on its remaining counterclaims. For the reasons stated below, we will affirm the decision of the District Court.

I. Background

In September 1998, AT & T and JMC entered into an agreement under which AT & T would provide prepaid calling services to JMC and JMC in turn would sell the services as prepaid telephone cards to end-users in the maritime market.[2] The maritime sector represented a new market for AT & T and, more importantly, a way to expand its business in the international market for prepaid phone cards, which give the end-user a preset amount of telecommunications services. According to JMC, the two companies had an implicit agreement that restricted JMC's sales territory for the cards to the maritime sector.

1. JMC is no longer in business.

2. The maritime market consists of foreign ships and their crew members and cruise ships and their passengers.

Appendix A

AT & T and JMC executed four documents to set up the agreement: the Contract Tariff Order Form, the Professional Services Agreement, Contract Tariff No. 10344, and an Addendum. The documents outlined the price JMC would pay for the telecommunications services behind the cards, as well as establishing a minimum annual revenue commitment (MARC) on the part of JMC. The Professional Services Agreement provided that JMC would design and print the cards while AT & T would provide funding in part for card production. The Addendum stated that, if a business downturn beyond JMC's control caused JMC to fail to meet the MARC, the parties would cooperate to develop a mutually agreeable solution.

In accordance with federal law, AT & T filed with the Federal Communications Commission (FCC) the executed Contract Tariff Order Form, Contract Tariff No. 10344, and AT & T FCC Tariff No. 1, which was a tariff previously filed with the FCC by AT & T and which was referred to in the other two documents. The Addendum was never filed with the FCC despite AT & T's alleged promise to do so. In addition, JMC asserts that, pursuant to Contract Tariff No. 10344 and AT & T Tariff No. 1, AT & T would be the exclusive provider of the services needed to complete calls using the cards. CT 10344 lists "Other Participating Carriers" as "NONE."

JMC soon developed concerns with both the quality of service provided by AT & T and the cards themselves. Specifically, JMC contends that the cards were often printed with duplicate identification numbers and incorrect instructions for foreign origination calls, *i.e.*, calls between

two foreign countries.[3] JMC estimated that sales of the cards fell by 50% because of the problems with foreign origination calls. Moreover, cardholders complained about AT & T's customer service, or lack thereof. Finally, users were frequently unable to complete calls from the United States to the Philippines, which was one of the more important selling points of the cards. JMC estimated that it lost 25% of its business due to the initial problems in completing calls to the Philippines. This particular problem was corrected after AT & T switched card traffic away from the original local country carrier, Pacific Gateway Exchange (Pacific).

Per the agreement, AT & T sent JMC invoices for its services. AT & T received a one-time, partial payment on November 2, 1998, of $400,000. JMC made no further payments to AT & T.

Due to JMC's concerns with service and other related problems, JMC sought more competitive rates from AT & T. The negotiations pursuant to the Addendum were unsuccessful, and AT & T filed a complaint against JMC on June 4, 1999, for the balance owed from cards already sold and the amount JMC owed under the MARC. JMC filed a counterclaim, alleging violations by AT & T of state law, the Sherman Act, and federal common law.[4] The District Court

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3. The meaning of "foreign origination" is in dispute. For purposes of this appeal, we accept JMC's proffered definition-calls between two foreign, *i.e.*, non-U.S., states. Also, for purposes of this appeal, we assume that any errors in the instructions were caused by AT & T.

4. After AT & T filed its complaint in this action, JMC filed a complaint against AT & T in the United States District Court for the (Cont'd)

dismissed JMC's antitrust counterclaim under Fed.R.Civ.P. 12(b)(6) and granted summary judgment pursuant to Fed. R. Civ. P. 56(c) on AT & T's complaint and against JMC on all of its remaining counterclaims.[5] This appeal followed.

II. Jurisdiction and Standard of Review

The District Court had original jurisdiction pursuant to 28 U.S.C. §§ 1331, 1332 and 1337, and 15 U.S.C. §§ 15 and 26. Also, the District Court had supplemental jurisdiction over JMC's state law claims under 28 U.S.C. § 1367. We have jurisdiction over the District Court's grant of summary judgment and motion to dismiss pursuant to 28 U.S.C. § 1291.

The standard of review for a motion to dismiss is plenary. *Jordan v. Fox, Rothschild, O'Brien & Frankel,* 20 F.3d 1250, 1261 (3d Cir.1994). When considering an appeal from a dismissal of a complaint pursuant to Rule 12(b)(6), we accept

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(Cont'd)

Eastern District of New York. *See JMC Telecom, LLC v. AT & T Corp.*, 99-cv-03710-SJ-MDG (E.D.N.Y.1999). The District Court of New Jersey enjoined JMC from prosecuting the action in the Eastern District of New York. JMC sought a writ of mandamus, which we denied. *See AT & T Corp. v. JMC Telecom, LLC,* 254 F.3d 1078 (3d Cir.2001). JMC filed a petition for a writ of certiorari with the Supreme Court, which it denied. *See JMC Telecom, LLC v. AT & T Corp.*, 534 U.S. 822, 122 S.Ct. 56, 151 L.Ed.2d 25 (2001).

5. Some of JMC's additional state law counterclaims were dismissed pursuant to Fed R. Civ. P. 12(b)(6). JMC does not refer to these claims in its appeal; therefore, they are not before us.

as true all of the allegations in the complaint and all reasonable inferences that can be drawn from them and view them in the light most favorable to the nonmoving party. *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 906 (3d Cir.1997).

The standard of review from a grant of summary judgment is plenary. *Gottshall v. Consol. Rail Corp.*, 56 F.3d 530, 533 (3d Cir.1995). Summary judgment is only appropriate if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law. FED.R.CIV.P. 56(c). In reviewing the District Court's grant of summary judgment, we view the facts in a light most favorable to the nonmoving party. *Gottshall*, 56 F.3d at 533.

III. Discussion

A. Antitrust Claim: Violation of 15 U.S.C. § 1

Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Before the District Court, JMC asserted two violations of the Sherman Act by AT & T which caused JMC to suffer an antitrust injury.[6] First, AT & T violated the Sherman Act by refusing to lower the rates assessed to JMC pursuant to the Addendum. Second,

6. AT & T argues that JMC failed to allege that it suffered an antitrust injury and, as such, failed to state a cause of action. Since JMC fails to state a violation for other reasons, we do not reach this issue.

AT & T violated the Sherman Act by forcing JMC to participate in a scheme to divide the market between maritime and non-maritime customers. This second argument is the one stressed by JMC on appeal. Specifically, JMC contests the District Court's finding that the restraint at issue was vertical, *i.e.*, between a supplier and distributor, rather than horizontal, *i.e.*, between two companies on the same level of production. Unless the restraint is horizontal, however, JMC's claims fail.

We find both of JMC's arguments to be unpersuasive. In regard to the first, the Supreme Court has ruled that:

> Section 1 of the Sherman Act requires that there be a "contract, combination ... or conspiracy" between the manufacturer and *other distributors* in order to establish a violation. 15 U.S.C. § 1. Independent action is not proscribed. A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently.

Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (emphasis added). This Court has interpreted Monsanto to impose a requirement on the distributor to come forward with evidence that tends to exclude the possibility that the supplier acted independently. *See Arnold Pontiac-GMC, Inc. v. Budd Baer Inc.*, 826 F.2d 1335, 1338 (3d Cir.1987). Here, JMC has not alleged action by other distributors in concert with AT & T. As such, JMC's argument fails because it has alleged only

unilateral action by AT & T. Such action cannot serve as a violation of the Sherman Act. *Monsanto,* 465 U.S. at 761, 104 S.Ct. 1464.

JMC's second argument is that AT & T violated the Sherman Act by prohibiting JMC from selling the cards to non-maritime customers. Vertical, non-price restraints imposed by the supplier are analyzed under the rule of reason standard.[7] *Bus. Elecs. Corp. v. Sharp Elecs. Corp.,* 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). At oral argument, JMC stipulated that it would not bring a claim under the rule of reason; rather, JMC argued that the arrangement between AT & T and JMC was a *per se* violation of the Sherman Act. According to JMC's argument, the agreement between the two companies represented a horizontal, rather than vertical, restraint. Since horizontal restraints are a *per se* violation of the Sherman Act, JMC would not need to allege a violation of the rule of reason.

The problem with JMC's argument, however, is that the relationship was primarily vertical. Although we agree that the relationship had horizontal elements, it is undisputed that AT & T supplied telecommunications service to JMC for resale. The fact that AT & T also sold phone cards at the resale level does not change the analysis. Vertical restraints are generally not *per se* violations of the Sherman Act, even

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7. When conducting a rule of reason inquiry, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. *Bus. Elecs. Corp.,* 485 U.S. at 723, 108 S.Ct. 1515 (quoting *Cont'l T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977)).

where a distributor and manufacturer also compete at the distribution level, *i.e.*, have some form of horizontal relationship (a/k/a/ dual distributor arrangement), as is the case here. *Elecs. Commc'ns Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, 243-44 (2d Cir.1997) (marshaling authority from the Sixth, Seventh and Tenth Circuits, as well as guidelines from the Department of Justice in finding that such restraints are not *per se* violations of the Sherman Act).

We conclude that *Electronics Communications* represents the best way for analyzing such arrangements and is consistent with the Supreme Court's observation that it is slow "to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986). JMC could have argued that the restraint at issue ought to be analyzed under the traditional rule of reason rather than attempt to squeeze the restraint into the *per se* realm.[8] JMC, however, did not. Accordingly, JMC failed to state a claim pursuant to the Sherman Act. The District Court properly dismissed the antitrust claim.

B. JMC's Federal Common Law Claims

On appeal, JMC also asserts two federal common law counterclaims against AT & T: breach of Tariff No. 1, and breach of the Contract Tariff.[9] Many of JMC's claims are

8. At oral argument, JMC's counsel stipulated that "[w]e specifically have claimed a *per se* case, only."

9. Federal common law creates a cause of action for breach of a communications contract. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654 (3d Cir.2003).

derived from the quality, or lack thereof, of service provided by AT & T to cardholders. Specifically, JMC alleges that AT & T did not provide JMC with the "world class dependability" that is expected from AT & T and, generally, provided poor customer service. These claims, however, are barred by the filed rate doctrine.

The Federal Communications Act requires that common carriers, such as AT & T, file "schedules showing all charges for itself and its connecting carriers." 47 U.S.C. § 203(a). The schedule must show the classifications, practices, and regulations affecting the charged rates. *Id.* The carrier shall not "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c). According to the filed rate doctrine, a customer is prevented from enforcing contract or tort rights that contradict the tariff. *AT & T v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 226, 118 S.Ct. 1956, 141 L.Ed.2d 222 (1998) (noting that "[r]espondent can no more obtain unlawful preferences under the cloak of a tort claim than it can by contract"). The classic example of the preemptive power of the doctrine occurs when a customer makes a claim for a rate that was not filed by the carrier-such claims are barred.

JMC claims that AT & T did not grant lower rates to JMC pursuant to the Addendum. The Addendum, however, was never filed with the FCC. As such, the Addendum is a contractual right that contradicts the tariff; the tariff establishes a set-price that the Addendum effectively limits and calls into question. Consequently, the Addendum cannot

afford a privilege, *i.e.*, a lower rate, to JMC. Moreover, the fact that AT & T allegedly agreed to file the Addendum provides no recourse to JMC; otherwise, the filed rate doctrine would have no import vis-à-vis its goals of transparency and non-discrimination of rates. *Id.* at 222, 118 S.Ct. 1956 (arguing that the carrier's intentional misrepresentations are irrelevant).

Furthermore, the filed rate doctrine has been expanded to exclude claims of insufficient and poor-quality service:

> Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. If discrimination in charges does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge.... An unreasonable discrimination in charges, that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.

Id. at 233, 118 S.Ct. 1956 (citations and internal quotations omitted). Here, JMC is claiming poor customer service in areas, such as customer support, that are not spelled out in the tariff. As such, JMC's claims of poor service are barred by the filed rate doctrine.[10]

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10. JMC cites *AT & T v. NOS Communications, Inc.*, 830 F.Supp. 225 (D.N.J.1993), in support of its claim. *NOS*, however, pre-dates the Supreme Court's articulation of the doctrine's expansive reach in *AT & T v. Central Office Telephone, Inc.*

The District Court also rejected JMC's claim that AT & T breached the tariff by not providing foreign origination capability on the grounds that JMC admitted in an e-mail that the "customer who uses the card outside the country always connects with the network." The email in question, however, is highly ambiguous, and it is unclear whether the context of the message was foreign origination calls or another, non-germane topic.

Nonetheless, JMC's argument still fails. The record illustrates that the problem with foreign origination stemmed from the fact that the cards "did not have the proper written instruction on how to (make such a call)." The quality of the written instruction on the cards, and the corresponding "ease of use," is beyond the terms of the tariff. Moreover, "ease of use" is potentially a method by which a carrier can introduce discrimination between customers. As such, JMC's argument is, again, one of quality of service beyond the scope of the filed tariff and, consequently, is banned by the filed rate doctrine.[11] *Id.*

On appeal, JMC has stressed that many of its claims seek to enforce promises made pursuant to the filed rate, rather than promises to generate an additional benefit. In this connection, JMC claims that AT & T breached the tariff by

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11. Although the filed rate doctrine produces harsh results in this case as alleged, such equitable concerns have been rejected by the Supreme Court. *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 128, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990) (noting that "[d]espite the harsh effects of the filed rate doctrine, we have consistently adhered to it."). This is true regardless of AT & T's ulterior motives. *See Cent. Off. Tel.*, 524 U.S. at 223, 118 S.Ct. 1956.

not serving as the exclusive provider of services to the Philippines and but instead by relying on Pacific.

Contract Tariff No. 10344 lists "other participating carriers" as "NONE." 47 C.F.R. § 61.3(z) defines an "other participating carrier" as a "carrier subject to the (Federal Communications) Act that publishes a tariff containing rates and regulations applicable to the portion o[f] (sic) through service it furnishes in conjunction with another subject carrier." JMC claims that AT & T breached this provision because Pacific was an undeclared "other participating carrier."

The District Court rejected JMC's argument. First, the District Court examined Pacific's actual filed tariff with the FCC. The District Court found that, since Pacific's filed tariff only pertained to international direct dial service and Pacific did not provide international direct dial service to customers in this case, the tariff does not contain "rates and regulations applicable" to the service Pacific provided to AT & T. Consequently, Pacific was not a participating carrier and, therefore, did not need to be listed on AT & T's tariff.

We disagree with the District Court's reasoning, but we nonetheless reach the same result. Specifically, the International Services Termination Agreement between AT & T and Pacific provides that the Pacific will supply AT & T with "international direct dial voice, fax or data communication." Simply put, the International Services Termination Agreement is not reconcilable with the District Court's rationale.

Appendix A

A better method of analyzing whether Pacific was a participating carrier is to consider the parties' relationship in terms of "end-on-end" versus "end-to-end" transmission set-ups. An "end-on-end" service arrangement is one in which each carrier participating establishes a separate rate for its segment of the service. *See Offshore Tel. Co. v. South Cent. Bell Tel. Co.*, 2 FCC Rcd. 4545, ¶ 13 n. 10 (1987). In an "end-to-end" arrangement, the carriers establish a rate for the entire transmission and the customer pays a single uniform rate to one carrier for completing a call. *Id.* For example, in *In the Matter of AT & T Commc'ns Revisions to Tariff F.C.C. Nos. 9 and 10*, 2 FCC Rcd 100, 1987 WL 343876 (1987), AT & T was allowed to de-list an Alaskan company, Alascom, as a participating carrier on its filed tariff. Previously, the two companies "provided interstate private line service on an end-on-end bases, each maintaining its own rates and tariffs for the private line service that it provided." *Id.* at ¶ 2 (footnote omitted). In response to an antitrust suit, AT & T changed the arrangement so that all its customers received the same rate for calls into Alaska regardless of whether they used Alascom or a competing service; hence, the companies now had an end-to-end arrangement with one rate for the service provided to the consumer. *In the Matter of AT & T Communications Revisions to Tariff F.C.C. Nos. 9 and 10*, 1985 WL 260380, 1985 FCC Lexis 2096, ¶ 7 (1985). As was the case with Alascom after the change in service, the price JMC card users paid is not a direct function of Pacific's price and, therefore, AT & T need not list the carrier as an other participating carrier.[12]

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12. *In the Matter of AT & T Co. Application for Authority Pursuant to Section 214*, 11 FCC Rcd 5396, 1996 WL 80039 (1996) (Cont'd)

Given the FCC's role in interpreting the FCA, the aforementioned decisions deserve *Chevron*-style deference. *See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967, 125 S.Ct. 2688, 2699, 162 L.Ed.2d 820 (2005) (noting that "we apply the *Chevron* framework to the Commission's interpretation of the (Federal) Communications Act"); *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). In contrast, JMC's proffered expert witness testimony regarding the definition of "other participating carrier" is unpersuasive because the question is one of law and because her testimony did not elaborate on how the term "participating carrier" has been defined by the FCC.

Returning to the text of 47 C.F.R. § 61.3(z), Pacific did not publish a rate applicable to the portion of through service it provided to AT & T for JMC traffic because the rate was not separate as is characteristic of an end-to-end relationship. As such, Pacific was not an "other participating carrier," and, consequently, AT & T did not violate the tariff by failing to list Pacific.

(Cont'd)

is also illustrative. AT & T wanted to provide end-to-end service to the ship-to-shore communications market, which is governed by a different statutory regime. Comsat objected to the application on the grounds that end-to-end service would be inconsistent with a participating carrier system, which it claimed was the governing structure for the market. The FCC noted that Comsat and other carriers had been allowed to deviate from a purely participating carrier arrangement because they had been allowed to bill collectively, *i.e.* one company bills for the service provided by a group of companies. *Id.* at ¶ 13.

Finally, to the extent that JMC claims that AT & T orally represented that it would provide JMC with exclusive AT & T service, such a claim is one for quality of service and is barred by the filed rate doctrine.[13]

C. JMC's State Law Claims

JMC asserted four state law counterclaims against AT & T that were dismissed at summary judgment: breach of contract, fraud, negligent misrepresentation, and breach of the covenant of good faith and fair dealing. The District Court found that each of the counterclaims was preempted by federal law. In the alternative, the District Court found that JMC's state law claims were barred by the filed rate doctrine.

We agree with the District Court in that JMC's state law claims are barred by the filed rate doctrine. First, there is no fraud exception to the filed rate doctrine. *Fax Telecomm.*, 952 F.Supp. at 952 (quoting *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 22 (2d Cir.1994)). Similarly, JMC's claim of negligent misrepresentation fails; to rule otherwise would "force the courts to determine what the reasonable rate would be in order to assess damages" and, therefore, violate the filed rate doctrine. *Fax Telecomm.*, 952 F.Supp. at 952; *also Marcus v. AT & T Corp.*, 138 F.3d 46, 60 (2d Cir.1998) (noting that the task of determining a reasonable rate is reserved to the exclusive province of the FCC). Also,

13. In so much as this is a claim for fraud, the allegation is also barred by the filed rate doctrine. *See Fax Telecomm. v. AT & T*, 952 F.Supp. 946, 952 (E.D.N.Y.1996), *aff'd* 138 F.3d 479 (2d Cir.1998).

enforcement of the duty of good faith and fair dealing would impermissibly enlarge the rights as defined by the tariff. *Cent. Off. Tel.*, 524 U.S. at 227, 118 S.Ct. 1956 (finding a claim for breach of the implied covenant of good faith and fair dealing to be barred). As such, the claim is preempted by the filed rate doctrine.

Finally, JMC's claim of breach of contract under state law mirrors its claim under federal common law. Both seek to enforce the terms of the tariff. Consequently, and for the reasons previously espoused, JMC's state law claim for breach of contract necessarily fails.

D. Summary Judgment for AT & T for Breach of Tariff Terms

We agree with the District Court in that JMC has failed to show that it should be excused from its contractual obligation to pay AT & T according to the tariff terms. JMC's defenses, much like its counterclaims, are based on AT & T's alleged breaches, which, as previously discussed, are barred by the filed rate doctrine. Since the material facts supporting AT & T's breach of tariff claim are not in dispute, summary judgment in favor of AT & T was appropriate.

IV. Conclusion

For the reasons discussed above, we will affirm the District Court's order dismissing JMC's antitrust claim. We will affirm the District Court's grant of summary judgment in favor of AT & T and against JMC on the remaining claims and counterclaims.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT FILED DECEMBER 1, 2006

UNITED STATES COURT OF APPEAL FOR THE THIRD CIRCUIT

No. 05-1304

AT&T CORP.

v.

JMC TELECOM, LLC,

Appellant

On Appeal from the United States District Court
for the District of New Jersey
District Court No. 99-cv-02578
District Judge: Hon. Mary Little Cooper

Argued on March 7, 2006

Before: GREENBERG and ROTH*, *Circuit Judges*
BUCKWALTER*, *District Judge*

JUDGMENT

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* Judge Roth assumed senior status on May 31, 2006.

** Judge Ronald L. Buckwalter, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

On Consideration whereof,

Appendix B

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued on March 7, 2006.

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered December 29, 2004, be and the same is hereby **affirmed. Costs taxed against the appellant.**

All of the above in accordance with the opinion of this Court.

ATTEST:
/s/ Marcia M. Waldron
Clerk

Dated: December 1, 2006

APPENDIX C — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 29, 2004

UNITED STATES DISTRICT COURT DISTRICT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-2578 (MLC)

AT&T CORP.,

Plaintiff,

v.

JMC TELECOM, LLC,

Defendant.

MEMORANDUM OPINION

COOPER, District Judge

This matter comes before the Court on a motion for summary judgment by plaintiff, AT&T Corp. ("AT&T"), pursuant to Federal Rule of Civil Procedure ("Rule") 56. AT&T requests summary judgment to grant its claim and to deny the counterclaims of defendant, JMC Telecom, LLC ("JMC").[1] Also before the Court are separate motions by JMC

1. This motion is listed on the docket as a motion for summary judgment, a motion to dismiss, and a motion for miscellaneous relief. (Dkt. entry no. 102.) On our review of the Notice of Motion and the supporting brief, the motion seeks only summary judgment.

for leave to (1) supplement the record in connection with JMC's opposition to AT&T's motion, and (2) file a sur-reply in support of JMC's supplemental brief in opposition to AT&T's motion. For the reasons stated in this memorandum opinion, the Court will grant AT&T's motion. The Court will also grant JMC's motions to supplement the record and to file a sur-reply.

BACKGROUND

AT&T engages in the "provision, distribution, and sale of telecommunications products and services," including long distance and international communications services, as a common carrier under the Federal Communications Act, 47 U.S.C. § ("Section") 151 *et seq.* (Rev. Fin. Pre-Tr. Ord. at 7.) JMC, which is no longer in business, was in the business of "the design, marketing and selling of prepaid telephone calling cards." (Cntr. Cl. ¶ 2.)

AT&T and JMC began negotiations in or around June 1998. (Rev. Fin. Pre-Tr. Ord. at 12, 27.) The parties entered into an agreement in September 1998, whereby AT&T would provide its Commercial Prepaid Card Service ("service") to JMC, and JMC in turn would sell prepaid phone card services ("cards") to end users. (Compl. ¶ 8-9.; Cntr. Cl. ¶ 6.) JMC planned to sell cards to customers in the maritime market, *i.e.*, workers on merchant vessels such as cargo ships and cruise lines. (Rev. Fin. Pre-Tr. Ord. at 10, 12, 27-29.) End users in the maritime market typically purchased cards to make calls originating in the United States and connecting to a foreign country, or originating in a foreign country and

connecting to another foreign country—this latter type known as "foreign origination" calls. (*Id.* at 27.)

The parties executed three documents: a Contract Tariff Order Form ("CTOF"), a Professional Services Agreement ("PSA"), and an Addendum to AT&T Custom Offer Between AT&T Corp. and JMC Telecom, LLC ("Addendum"). (Rev. Fin. Pre-Tr. Ord. at 13-14, 31.) The PSA provided that JMC would design and print prepaid phone cards and that AT&T would fund in part the production of the cards. (Cabri Aff. ¶ 7, Ex. 1, arts. 1, 3.) The Addendum stated that if a business downturn beyond JMC's control caused JMC to fail to meet its revenue commitments to AT&T, *see infra*, then the parties would cooperate in efforts to develop a mutually agreeable solution which could include a change in rates. (Cabri Aff., Ex. 1.)

Three documents filed with the Federal Communications Commission ("FCC") set forth the applicable rates, terms and conditions governing the provision of service to JMC. These were: (1) the executed CTOF, (2) Contract Tariff No. 10344 ("Contract Tariff"), based on an illustrative contract tariff prepared by the parties for this agreement, and (3) AT&T FCC Tariff No. 1 ("Tariff No. 1"), a tariff previously filed with the FCC by AT&T and referred to in both the CTOF and the Contract Tariff. (Compl. ¶ 12, Exs. 1, 2.; Rev. Fin. Pre-Tr. Ord. at 13-15.) The Contract Tariff also established a minimum annual revenue commitment ("MARC") to be satisfied by JMC through its purchases of AT&T's service. (*io*)

JMC, following the execution of these documents, marketed and sold the service to end users through a card it named the "Rring Latitude" card. (Rev. Fin. Pre-Tr. Ord. at 15, 32.) JMC began selling the cards in September 1998, and soon developed concerns with the service provided by AT&T. *(Id.;* Cabri Aff. ¶¶ 8-10.) JMC communicated various concerns to AT&T. JMC reported problems with the cards themselves, *e.g.*, cards were printed with (1) duplicate personal identification numbers that should have been unique and (2) incorrect instructions for foreign origination calls. (Rev. Fin. Pre-Tr. Ord. at 21-22, 32.) JMC reported end-user complaints about AT&T's customer service. *(Id.* at 22, 33.) JMC also reported incidents of end users being unable to connect on calls from the United States to the Philippines using the Rring Latitude Card. *(Id.* at 22-23, 33-34.) This last problem was corrected in November or December 1998, after AT&T switched card traffic away from its original local country carrier, Pacific Gateway Exchange ("PGE"), in favor of a different mix of local carriers. *(Id.* at 23, 34.)

AT&T sent JMC invoices for its service beginning in September 1998. *(Id.* at 15-16.) AT&T received a payment of $400,000 on November 2, 1998, and received no other payments from JMC. *(Id.* at 16.)

JMC, following these service problems, sought more competitive rates and discounts from AT&T. Representatives of JMC and AT&T met between February and April, 1999, to discuss the possibility of JMC's receiving lower rates from AT&T, but these meetings produced no new agreement. (Rev. Fin. Pre-Tr. Ord. at 18-20, 35-37.)

Appendix C

AT&T filed the complaint on June 4, 1999, alleging that JMC breached the Contract Tariff by incurring more than $2.3 million in AT&T service and failing to pay $1.9 million in service charges. (Compl. ¶ 16.) AT&T also alleges that JMC owes $5,624,249.80 in shortfall damages since JMC failed to meet its MARC for the first year of the contract. (Rev. Fin. Pre-Tr. Ord. at 17, 26.) JMC filed a second amended answer with counterclaims on July 30, 2003, alleging the following against AT&T: (1) breach of contract; (2) breach of Tariff No. 1; (3) breach of the Contract Tariff; (4) fraud; (5) negligent misrepresentation; and (6) breach of the covenant of good faith and fair dealing. (Cntr. Cl. ¶¶ 34-73.) AT&T filed this motion on November 24, 2003, seeking summary judgment on its claim against JMC, as well as on JMC's counterclaims. The Court will grant AT&T this relief.[2]

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2. The second amended answer followed extensive litigation in this dispute. The Court will summarize the case history for the sake of completeness.

JMC filed a complaint in the United States District Court for the Eastern District of New York on June 29, 1999, shortly after AT&T filed its claim here, claiming, *inter alia*, breach of contract and various antitrust violations. (Brasso Decl., Ex. 2.) JMC also moved in this Court on December 7, 1999, to dismiss the complaint or in the alternative to transfer the action for improper venue. (Dkt. entry no. 10.) We denied JMC's motion. (Dkt. entry no. 16 ("1-21-00 Order").) JMC then moved: (1) for reconsideration of the 1-21-00 Order, (2) for certification for immediate appeal of the 1-21-00 Order, and (3) to dismiss for lack of personal jurisdiction. AT&T moved to enjoin JMC from prosecuting its action in the Eastern District of New York. We denied JMC's separate motions and granted AT&T's motion. (Dkt. entry no. 33 ("3-17-00 Order").)

(Cont'd)

Appendix C

DISCUSSION

I. *Governing Law*

A. Standard for Summary Judgment

A court may grant a motion for summary judgment

> if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(Cont'd)

JMC appealed from the 3-17-00 Order, and the Third Circuit Court of Appeals affirmed our order on March 26, 2001. (Dkt. entry nos. 51, 52.) JMC filed a writ of certiorari with the United States Supreme Court, and on June 8, 2001, we stayed the proceedings pending resolution of the writ. (Dkt. entry no. 57.) The writ was denied, and we reopened the case on August 1, 2002. (Dkt. entry no. 59.)

AT&T moved on October 24, 2002 to dismiss certain counts of JMC's counterclaim, and we granted that motion on March 21, 2003. (Dkt. entry no. 70.) JMC filed the second amended answer with counterclaims on July 30, 2003. (Dkt. entry no. 91.) AT&T filed its motion on November 24, 2003. (Dkt. entry no. 102.) Oral argument on that motion was conducted on July 28, 2004. JMC filed its motions on September 3 and October 15, 2004. (Dkt. entry nos. 127, 135). When all briefing was completed, we took the motions under advisement on November 15, 2004.

Fed.R.Civ.P. 56(c). Once the summary judgment movant has met this *prima facie* burden, the nonmovant "must set forth specific facts showing that there is a genuine issue for trial" and "may not rest upon the mere allegations or denials of the adverse party's pleading." *Id.* at (e).

A court must view the evidence in the light most favorable to the nonmovant when deciding a summary judgment motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). At the summary judgment stage, the Court's role is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). This standard "provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Id.* at 247-48 (emphasis in original). A fact is material only if it might affect the action's outcome under governing law. *Id.* at 248.

B. Filed Rate Doctrine

AT&T is a telecommunications service provider regulated as a common carrier by the FCC pursuant to the Federal Communications Act of 1934 ("FCA"), Section 201 *et seq.* Section 203(a) requires a common carrier to file a schedule, or "tariff," with the FCC that shows all of its charges for communications services and the classifications, practices, and regulations that affect such charges. 47 U.S.C. § 203(a); *Fax Telecommunicaciones v. AT&T*, 952 F.Supp. 946, 951 (E.D.N.Y. 1996) ("Fax I"). The FCA mandates that

no carrier shall "extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges, except as specified in such schedule." 47 U.S.C. § 203(c). Once filed with the FCC, then, a tariff controls exclusively the rights and liabilities of the carrier and its customers as a matter of law. *Fax I*, 952 F.Supp. at 951.

Customers are presumed to have knowledge of the publicly filed tariff, and therefore "any privately negotiated rates that depart from the filed rate are superseded." *Fax I*, 952 F.Supp. at 951. Under the aptly-named "filed rate doctrine," an aggrieved customer is prevented from enforcing contract rights that contradict the tariff. *Id. See also Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 222-23, 227 (1998) ("[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. . . . The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.") (citations and quotations omitted); *Fax Telecommunicaciones Inc. v. AT&T*, 138 F.3d 479, 488 (2d Cir. 1998) ("Fax II") (filed rate doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the [FCC]").

The filed rate doctrine is "the central principle of the regulatory scheme for interstate telecommunications carriers." *Fax II*, 138 F.3d at 488. The doctrine serves two primary purposes: non-justiciability and anti-discrimination. *Fax I*, 952 F.Supp. at 951. The doctrine recognizes that "the reasonableness of rates in a regulated industry is a question solely for the governing regulatory body." *Id.* (citation omitted). Also, "the doctrine prevents utilities from

discriminating in the prices they charge for the same service among different ratepayers." *Id.* (citation omitted).

Application of the filed rate doctrine may lead to seemingly unfair results. *See, e.g., Fax II*, 138 F.3d at 484-85, 488-91 (affirming district court's partial grant of summary judgment in favor of AT&T under the doctrine, even though "the undisputed facts indicate[d] that AT&T may have acted with fraudulent intent and at the very least was negligent," and noting "[a]pplication of the filed rate doctrine in any particular case is not determined by the culpability of the [carrier's] conduct or the possibility of inequitable results"). *See also Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 128 (1990) (citing examples of strict adherence to the doctrine despite its harsh effects). Strict application is needed, however, to prevent discrimination: "Regardless of the carrier's motive—whether it seeks to benefit or harm a particular customer—the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that antidiscriminatory policy which lies at the heart of the common-carrier section" of the FCA. *Cent. Off.*, 524 U.S. at 223.

II. *JMC's Counterclaims*

A. State Law Claims

JMC asserts four state-law counterclaims against AT&T: (1) breach of contract, (2) fraud, (3) negligent misrepresentation, and (4) breach of the covenant of good faith and fair dealing. (Cntr. Cl. ¶¶ 34-37, 46-73.) These claims are based on, *inter alia*, alleged misrepresentations

made by AT&T both in its negotiations with JMC and during the service period, as well as alleged failures to provide service in accordance with the parties' agreements. (*Id.*) Because we find that each of these counterclaims is preempted by federal law, we will grant summary judgment in favor of AT&T on JMC's state-law counterclaims.

"The establishment of a broad scheme for the regulation of interstate service by communications carriers indicates an intent on the part of Congress to occupy the field to the exclusion of state law. Since Congress intended to occupy the field, questions concerning the duties, charges and liabilities of ... telephone companies with respect to interstate communications service are to be governed solely by federal law." *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654 (3d Cir. 2003). Accordingly, state-law claims regarding interstate communications service are preempted by federal law. *See, e.g., Am. Tel. & Tel. Co. v. Cent. Off. Tel., Inc.*, 524 U.S. 214, 220-21, 224-28 (1998) (finding state-law claims of breach of contract, including breach of implied covenant of good faith and fair dealing, and tortious interference with contract to be preempted).

JMC's state-law claims are preempted. Because each of these claims arises out of the service agreement between AT&T and JMC, each concerns the "duties, charges and liabilities of [AT&T] with respect to interstate communications service." *Worldcom*, 343 F.3d at 654. As such, AT&T's duties and liabilities are governed solely by federal law, *id.*, and JMC's state-law claims are barred.

Appendix C

JMC's state-law claims, were they not preempted by federal law, nonetheless would be barred by the filed rate doctrine. "[T]here is no fraud exception to the filed rate doctrine," and in cases such as this one involving allegations of fraudulent conduct, the Court must abide the doctrine's principle of non-justiciability by "[leaving] enforcement to the [FCC, which is] best situated both to discover when regulated entities engage in fraud and to remedy the wrongdoing when the specter of fraud arises." *Fax I*, 952 F.Supp. at 952 (citations and quotations omitted). *See also Cent. Off.*, 524 U.S. at 227 ("The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier."). If JMC's state-law claims were not preempted, the Court would find these claims to be barred by the filed rate doctrine because to hold otherwise would allow an impermissible alteration of the tariffed rate. Rates "do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa." *Id.* at 223. JMC's state-law claims in effect challenge the reasonableness of the filed rate by challenging, *inter alia*, the quality of service provided. This is precisely the type of challenge that the filed rate doctrine prevents.

The FCA's savings clause, Section 414, does not prevent JMC's state-law claims from being preempted. This clause "preserves only those rights that are not inconsistent with the statutory filed-tariff requirements." *Cent. Off.*, 524 U.S. at 227. JMC argues that its claims are not inconsistent with the tariff but rather seek to enforce the tariff's terms. (Def. Br. at 15-16.) However, the savings clause "cannot in

reason be construed as continuing in [customers] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the [FCA]." *Cent. Off.*, 524 U.S. at 227-28. JMC's common-law claims are inconsistent with the FCA in that they challenge the quality of service provided under the tariff. This is impermissible under the filed rate doctrine.

B. Federal Claims

JMC also asserts two federal-law counterclaims against AT&T: (1) breach of Tariff No. 1 and (2) breach of the Contract Tariff. (Cntr. Cl. ¶¶ 38-45.) These claims are based on, *inter alia*, JMC's allegations that AT&T: (1) "represented to JMC that it would provide JMC with AT&T's telecommunications network services, but, instead, AT&T substituted services," (2) "did not provide JMC with the world class service that is expected from AT&T," (3) "used inferior carriers to provide network services to JMC," (4) failed to provide the promised level of foreign origination capability, (5) provided "poor customer service" and "inferior and inadequate technical service," (6) limited JMC's sales to the maritime market, and (7) did not grant JMC lower rates or deeper discounts under the Addendum. (*Id.* ¶¶ 6-33.) We hold that both of JMC's federal-law counterclaims are barred by the filed rate doctrine.

JMC's counterclaims fail for several reasons. First, JMC challenges the reasonableness of AT&T's filed rates by challenging the quality of service provided. For example, JMC alleges that AT&T provided poor customer and technical service. (*Id.* ¶¶ 6-33.) As noted *supra*, rates do not exist

independent of the services provided, and a claim of insufficient service is functionally equivalent to a claim of unreasonable rates. *Cent. Off.*, 524 U.S. at 223. Such a claim is barred by the filed rate doctrine. Second, JMC alleges that AT&T breached promises that do not appear in either Tariff No. 1 or the Contract Tariff. The Addendum, for example, was not filed with the FCC and therefore does not have the force of a filed tariff. JMC alleges that AT&T breached a promise to file the Addendum with the FCC, but fails to point to a provision in either Tariff No. 1 or the Contract Tariff that required AT&T to do so. As noted *supra*, the filed tariff controls exclusively the rights and liabilities of AT&T as a matter of law. *Fax I*, 952 F.Supp. at 951. Representations made outside of Tariff No. 1 and the Contract Tariff, whether oral or written, are not enforceable against AT&T.[3]

JMC further asserts that its counterclaims do not dispute the Contract Tariff or Tariff No. 1, but rather seek to enforce the tariffs' terms. JMC's argument here focuses on two allegations: that (1) AT&T used an inferior local carrier for calls in the Philippines in violation of the Contract Tariff, and (2) the cards "*never* had foreign origination capability."

3. Because the Addendum was not part of the agreement between the parties, we need not address JMC's claim that AT&T breached the Addendum by failing to provide a lower rate or deeper discount when JMC could not meet its MARC. We note, however, that the Addendum would seem to obligate AT&T merely to "cooperate in efforts to develop a mutually agreeable alternative proposal," which "may include changes in rates." (Addendum, Brown Aff., Ex. I.) As shown by the meetings that took place between February and April 1999, AT&T seems to have cooperated in such discussions with JMC whether or not it was obligated to do so, but that did not result in a change in the filed tariffs' terms.

(Def. Br. at 24-28 (emphasis in original).) This latter claim is discredited by JMC's own admission that the "customer who uses the card outside the country always connects with the network." (Cabri email, Brown Supp. Aff., Ex. F.) The record suggests that the Rring Latitude's call-completion rate for foreign origination calls was neither zero nor one hundred percent. Nonetheless, neither the Contract Tariff nor Tariff No. 1 promise a specific call-completion rate.

The other claim, that AT&T's use of PGE as a local carrier in the Philippines violated a tariff term that no "other participating carrier" would be used, also fails. The FCC has defined "Other participating carrier" as a "carrier subject to the [FCA] that publishes a tariff containing rates and regulations applicable to the portion or through service it furnishes in conjunction with another subject carrier." 47 C.F.R. § 61.3(z).[4] JMC cites PGE's Tariff No. 1 to support its assertion that PGE fits the Section 61.3(z) definition. PGE's Tariff No. 1, however, applies to "international message telecommunications furnished by [PGE]," for which PGE "provides international direct dial service." (PGE Tariff §§ 1,3; Granton Cert., Ex. A.) Here, PGE did not provide international direct dial service to customers, but rather provided local connecting service in the Philippines to AT&T. As such, PGE's Tariff No. 1 is not a published tariff

4. JMC argues that 47 C.F.R. § 61.54(h) controls the question of whether PGE was an "other participating carrier." (Def. Br. at 24-25.) In that section, the FCC requires that any "other participating carrier" be listed in the tariff. Section 61.3(z), however, defines the term. For Section 61.54(h) to apply here, we first would need to find that PGE fits within the Section 61.3(z) definition of "other participating carrier." We do not.

"containing rates and regulations applicable" to the service it provided AT&T. PGE, therefore, was not an "other participating carrier" as the FCC has defined that term. We find that AT&T did not breach the Contract Tariff by not listing PGE as an "other participating carrier."

JMC cites seven additional provisions of Tariff No. 1, claiming breach of these provisions by AT&T's service. We likewise find no merit to these assertions.

- § 6.33.2 says that AT&T's service "is available twenty-four hours a day, seven days a week." JMC argues that AT&T breached this clause because "6 of 7 calls failed to connect, at one point the connection rate, by AT&T's own measure, was 0% and foreign origination calls could not complete." (Def. Br. at 29.) We do not read § 6.33.2 to guarantee constant service, but rather to indicate that service is generally available at all times without planned restrictions. As noted *supra*, Tariff No. 1 does not promise a specific call-completion rate. We find that the alleged gaps in service did not breach § 6.33.2.

- §§ 6.33.3.0 and 6.33.3.D state that customers' calls "will be interrupted with an announcement when the balance is about to be depleted" and calls in progress "will be terminated . . . if the balance [on the card] is insufficient to continue the call." Contrary to JMC's assertion, these sections do not state that such interruptions are "the only time[s]" at which calls might be interrupted or terminated. (Def. Br. at 29.) We find no violation of § 6.33.3 because the section

does not contain the promise AT&T is alleged to have breached.

- § 2.1.2 states that "[a]ny suitable technology or combination of technologies may be used." JMC asserts that "substandard alternate route technology was used." (Def. Br. at 29.) JMC does not specify what technology was "substandard," either as used by JMC or by PGE, or what technology should have been used. To the extent that JMC is arguing that using PGE as an "alternate route" is a violation of § 2.1.2, we have found *supra* that using PGE as a local carrier did not violate the Tariff.

- § 6.33.1 states that AT&T "provides voice grade communications service for calls." JMC asserts that "the service was not voice grade because it did not work." (Def. Br. at 29.) We find that "voice grade" service refers to a type of service rather than a quality-level of service. *See, e.g., In re Application of Motorola, Inc.*, 13 FCC Rcd. 5182, ¶ 56 (Mar. 3, 1998) (distinguishing voice grade services from data transmissions); *In the Matter of AT&T Commun. Revisions to Tariff F.C.C. No. 9*, 4 FCC Rcd. 5781 (July 19, 1989) (discussing voice grade service in terms of bandwidth). JMC has cited no authority to suggest that "voice grade" indicates a quality-level of service. We find that AT&T has not breached this section.

- § 2.7.1 states that AT&T is "responsible for the quality of transmission from station to station."

JMC does not explain how AT&T allegedly violated this section. (Def. Br. at 29.) To the extent that JMC intends to suggest that AT&T failed to meet a certain level of quality, this claim is barred by the filed rate doctrine. We find no violation of § 2.7.1.

- § 2.7.3 states that AT&T "will furnish and maintain its service components in a manner suitable for LDMTS" and "will be responsible for the compatibility of its equipment or services." JMC alleges that AT&T's "service was not compatible with PGE's." (Def. Br. at 29.) JMC does not allege that any service component was not maintained in a manner suitable for LDMTS, nor has JMC explained how AT&T's service was not compatible with PGE's. *(Id.)* We have found *supra* that AT&T did not breach the Tariff by using PGE as a local carrier, and we likewise find that AT&T has not breached § 2.7.3.

- §§ 2.5.10.E.2 and 2.5.10.E.7 provide that a customer may withdraw its order before AT&T has provided service, and that if AT&T has accepted the order then a cancellation charge of $20,000 will apply (based on an average annual revenue commitment greater than $1,500,000). JMC argues that AT&T is limited to a $20,000 cancellation charge. (Def. Br. at 29.) The Tariff language is clear that this cancellation charge applies if a customer cancels its order before AT&T has provided service. JMC does not suggest the language means otherwise. We find the cancellation charge cited by JMC in §§ 2.5.10.E.2 and 2.5.10.E.7 inapplicable because JMC did receive service from AT&T.

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JMC's federal counterclaims are not saved by Section 2.3.1.A of AT&T's Tariff No. 1. That section states that AT&T's "liability, if any, for its willful misconduct is not limited by this tariff." (Tariff No. 1, Brown Aff., Ex. H.) However, the Tariff does limit AT&T's liability for "any other claim or suit ... for damages associated with the installation, provision, termination, maintenance, repair or restoration of LDMTS" to an amount that "shall not exceed an amount equal to the initial period charge." (*Id.*) While the "willful misconduct" clause can remove limitations on liability set by the Tariff, it cannot do so for limitations on liability imposed by the FCA and the filed rate doctrine. *See Cent. Off.*, 524 U.S. at 228 ("Section 2.3.1 . . . cannot be construed to do what the parties have no power to do. It removes only those limitations upon liability imposed *by the tariff*, not those imposed by law. It is the Communications Act that renders the promise of preferences unenforceable.") (emphasis in original). JMC argues that the filed rate doctrine does not bar claims based on the willful misconduct clause having removed restrictions on liability when such claims do not conflict with the FCA, and that its claims are not preempted because they are consistent with the FCA. (Def. Supp. Br. at 13-18.) As we have held, *supra* II(A), II(B), JMC's claims are barred under the FCA and the filed rate doctrine. We therefore find that Section 2.3.1.A of Tariff No. 1 will not rescue JMC's claims from the filed rate doctrine.

III. *AT&T's Claim*

AT&T seeks summary judgment on its breach of tariff claim against JMC, alleging that under ¶ 6.A.1 of the Contract

Tariff, "JMC is required to pay all charges within 30 days after each bill is rendered," and that AT&T "rendered service to JMC and billed sums that JMC has failed to pay." (Compl. $ 21-22.) AT&T claims damages of (1) $1,973,943.00 due to JMC's failure to pay invoices for AT&T's provision of service and (2) $5,624,249.80 due to JMC's failure to pay an invoice for shortfall charges after JMC's failure to meet its MARC for the first year of the Contract Tariff. (Rev. Fin. Pre-Tr. Ord. at 15-17, 26.) In addition, AT&T seeks prejudgment interest on the unpaid usage and shortfall charges, as well as attorneys' fees. (*Id.* at 27.)

AT&T's breach of tariff claim arises under federal law. The Contract Tariff, filed with the FCC, is a creature of federal law. *See MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1093-96 (3d Cir. 1995); *Young Soon Oh v. AT&T Corp.*, 76 F.Supp.2d 551, 555-56 (D.N.J. 1999). "[A] contract action for unpaid services under the terms and conditions set forth in a filed tariff 'arises under' the laws of the United States." *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 654 (3d Cir. 2003). Since the FCA does not create an action for breach of tariff, federal common law guides our analysis. *Id.* at 654. Under federal common law, we must give the tariff's words their ordinary meaning. *MCI*, 71 F.3d at 1100 (citation omitted).[5]

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5. JMC asserts that "[a]ny ambiguities in a contract tariff must be construed in favor of the customer" (Def. Br. at 11). *See Nat'l Comm. Assoc., Inc. v. Am. Tel. & Tel. Co.*, No. 92-1735, 1998 WL 118174, at *18 n.19 (S.D.N.Y. Mar. 16, 1998). However, JMC does not allege, nor do we find, any ambiguity in the Contract Tariff that must be construed so.

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The Contract Tariff provides that the customer, JMC, "will receive a 35% discount on the aggregate face value of all the cards purchased." (Contract Tariff ¶ 5(A), Brown Aff., Ex. G.) The Contract Tariff further states, under the heading "Payment Terms," that "[o]nce a bill is rendered to [JMC], any such bill must be paid by [JMC] within 30 days." (*Id.* at ¶ 6(A)(1).)

AT&T alleges that JMC did not pay its invoices for service charges or shortfall charges.(Rev. Fin. Pre-Tr. Ord. at 15-17.) AT&T sent JMC service invoices between September 23, 1998 and April 2, 1999. (Brown Aff., Ex. L.) These invoices show that (1) AT&T billed JMC a total of $2,373,943, (2) JMC paid a total of $400,000, and (3) JMC's balance due was $1,973,943. (*Id.*)[6] AT&T also sent JMC an invoice for shortfall charges on July 28, 2000, and again on September 6, 2000, for $5,624,249.80. (Brown Aff., Ex. 0.) JMC does not dispute either that it received these invoices or that it paid only $400,000. (*See, e.g.*, Rev. Fin. Pre-Tr. Ord. at 7, 17.) JMC does argue that (1) it is not prevented by Section 2.5.3.D of Tariff No. 1 from now challenging AT&T's charges, and (2) its failure to pay should be excused for various reasons.

AT&T argues that the charges in its invoices to JMC are now incontestable under the terms of Tariff No. 1. (Pl. Rep. Supp. Br. at 1.) Section 2.5.3.D provides that if a customer

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6. AT&T argues in its brief that it invoiced JMC for a total of $2,375,750.75. (Pl. Br. at 9.) AT&T also states that it gave JMC a credit of $1,807. (*Id.*) We do not find support for this assertion in the invoices. However, if we were to rely on these numbers, JMC's balance due would be virtually the same: $1,973,943.75.

does not provide AT&T with "written notice of a dispute with respect to LDMTS charges within six months from the date the bill was first presented to the Customer for payment, such charges shall be deemed to be correct and binding on the Customer." (AT&T Tariff No. 1, Brown Aff., Ex. H.) "LDMTS" is an abbreviation for Long Distance Message Telecommunications Service, which is the subject of Tariff No. 1.[7] The parties now dispute whether certain written communications from JMC to AT&T constitute the notice required by Section 2.5.3.D. These communications include a letter from JMC's attorney, Joseph Alioto, and the complaint JMC filed in the Eastern District of New York. (Def. Supp. Br. at 4-6.) While both of these documents exhibited JMC's displeasure with various aspects of the parties' relationship, neither could be said to give notice to AT&T that JMC disputed its charges. Mr. Alioto's letter states that he hopes "cooperation between AT&T and JMC can recapture [lost customers]," which account for "$12 million a year, our first year requirement." (Alioto letter, Messina Cert. Supp. Rec., Ex. B.) Alioto continues: "If they cannot be eliminated completely or partially, then at least there should be some sharing." (*Id.*) This statement concerns JMC's MARC for the first year, its inability to meet the revenue commitment, and its hope that cooperation will resolve the shortfall. This statement, however, does not dispute the validity of the shortfall charges or give notice to AT&T that JMC will dispute such charges. Similarly, JMC's complaint in the Eastern District of New York would have given AT&T notice

7. JMC's argument that Section 2.5.3.D is inapplicable to its service invoices is without merit.

that JMC was not satisfied with the parties' relationship.[8] However, JMC's Eastern District complaint does not dispute the validity of charges or mention specific invoices. (JMC Compl., ¶¶ 11-17, Messina Cert. Supp. Rec., Ex. B.) Again, this written communication fails to give notice that JMC sought to dispute the validity of AT&T's charges.

JMC, even if it were not barred from disputing the invoiced charges, has failed to show that it should be excused from its obligation to pay according to the tariff terms. JMC argues that its obligation to perform was excused because AT&T first materially breached various written and oral agreements with JMC. (Def. Br. at 10.) JMC's argument is unavailing. First, JMC cites no authority for the proposition that a state common-law contract defense excuses performance of a filed federal tariff. (*See* Def. Br. at 10 (citing two decisions under New York law and one under California law). *See also Multi Commun. Media Inc. v. AT&T Corp.*, No. 96-2679, 1997 WL 188938, at *5 (S.D.N.Y. Apr. 18, 1997) ("The filed rate trumps contract defenses").) Second, JMC's claims are based on promises not included in the Contract Tariff and such claims are preempted by the filed rate doctrine. *See supra,* II(B).

The material facts supporting AT&T's breach of tariff claim are not in dispute. JMC received invoices pursuant to the Contract Tariff in the amount of $7,998,192.80, and, except for one payment of $400,000, JMC did not pay those invoices. JMC's proffered defenses to AT&T's claim fail as

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8. Such notice hardly was needed, as AT&T already had brought its action against JMC here.

a matter of law. We will grant therefore AT&T's motion for summary judgment on its claim against JMC, in the amount of $7,598,192.80, plus prejudgment interest. "To allow AT&T to recover its tariff charges without awarding prejudgment interest would be to diminish the tariff charge by an amount representing the value of the use of the money owed for the period prior to judgment." *AT&T Corp. v. Cmty. Network Servs., Inc.*, No. 97-316, 1999 WL 1267457, at *6 (S.D.N.Y. Dec. 29, 1999) (citation and quotations omitted). Therefore, the filed rate doctrine requires that we award prejudgment interest. *Id. See also Int'l Tel. Ctr., Inc. v. Am. Tel. & Tel. Co.*, No. 96-3398, 1997 WL 599618, at *6 (E.D. La. Sept. 16, 1997). Because the FCA does not impose a federal interest rate for unpaid tariff charges, and because the CTOF contained an explicit choice of law provision stating that the parties' agreement would be governed by New York law except to the extent that federal law applies, we will apply New York's statutory interest rate of nine per cent per annum. N.Y.C.P.L.R. § 5004.[9] *See Cmty. Network*, 1999 WL 1267457 at *6 (applying New York's interest rate); *Int'l Tel.*, 1997 WL 599618 at *6 (same). Interest accrues from thirty days after JMC received its final invoices for service and shortfall, *i.e.* May 1, 1999 and October 7, 2000. (Pl. Br. at 12-13.)

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9. We note that under Tariff No. 1 AT&T may be entitled to an interest rate of 18%. (§ 2.5.3.B, Tariff No. 1, Brown Aff., Ex. H.) AT&T has not informed us of its preferred rate. We apply the New York rate in our discretion, noting both the choice of law clause in the CTOF and that JMC is no longer a going concern. *Int'l Tel.*, 1997 WL 599618 at *6 ("While prejudgment interest is required by the filed rate doctrine, the rate of interest is discretionary.") Our discretion in awarding prejudgment interest is broad. *Skretvedt v. E.I. DuPont De Nemours*, 372 F.3d 193, 208 (3d Cir. 2004).

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Interest shall accrue until the date of judgment, December 29, 2004. We calculate the prejudgment interest and the resulting judgment amount as follows:

Formula for simple prejudgment interest:

(Damages) X (Interest Rate) X (Years)

Amount of prejudgment interest on service invoices:

($1,973,943.00) X (0.09%) X (5.663 years) = $1,006,059.53

Service charge damages:

$1,973,943.00 + $1,006,059.53 = $2,980,002.53

Amount of prejudgment interest on shortfall invoices:

($5,624,249.80) X (0.09%) X (4.227 years) = $2,139,633.35

Shortfall charge damages:

$5,624,249.80 + $2,139,633.35 = $7,763,883.15

Appendix C

TOTAL DAMAGES:

$2,980,002.53 + $7,763,883.15 = $10,743,885.68

IV. *JMC's Motions*

JMC has filed separate motions for leave to (1) supplement the record in connection with JMC's opposition to AT&T's motion, and (2) file a sur-reply in support of JMC's supplemental brief in opposition to AT&T's motion. We received and reviewed those materials and will therefore grant both of JMC's motions.

CONCLUSION

We will grant summary judgment in favor of AT&T, allowing AT&T's claim against JMC, and denying JMC's counterclaims against AT&T. We also will grant JMC's motions to supplement the record and to file a sur-reply. An appropriate order and judgment will follow.

s/ Mary L. Cooper
MARY L. COOPER
United States District Judge

APPENDIX D — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED DECEMBER 29, 2004

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-2578 (MLC)

AT&T CORP.,

Plaintiff

v.

JMC TELECOM, LLC,

Defendant.

ORDER & JUDGMENT

For the reasons stated in the Court's memorandum opinion, **IT IS** on this 29th day of December, 2004, **ORDERED** that defendant JMC Telecom, LLC's ("JMC") motion for leave to supplement the record (dkt. entry no. 127) is **GRANTED**; and

IT IS FURTHER ORDERED that JMC's motion to permit filing of a sur-reply (dkt. entry no. 135) is **GRANTED**; and

IT IS FURTHER ORDERED that plaintiff AT&T Corp.'s ("AT&T") summary judgment motion, pursuant to Federal Rule of Civil Procedure 56 (dkt. entry no. 102) is **GRANTED**; and

IT IS ADJUDGED that **SUMMARY JUDGMENT OF NO CAUSE OF ACTION** is entered in AT&T's favor on JMC's counterclaims; and

IT IS FURTHER ADJUDGED that judgment is entered in favor of plaintiff and against defendant in the amount of $10,743,885.68; and

IT IS FURTHER ORDERED that AT&T is **GRANTED LEAVE** to move for costs and counsel fees and expenses pursuant to Local Civil Rule 54.1 *et seq.*; and

IT IS FURTHER ORDERED that the Clerk designate the action as **CLOSED**.

s/ Mary L. Cooper
Mary L. Cooper
United States District Judge

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED MARCH 21, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 99-2578 (MLC)

AT&T CORP.,

Plaintiff,

v.

JMC TELECOM, L.L.C.

Defendant.

COOPER, District Judge

MEMORANDUM AND ORDER

This matter comes before the Court upon a motion by plaintiff ("AT&T") to dismiss Counts 2, 4, 5, and 6 of defendant's ("JMC") counterclaim for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). This action arises out of an agreement between AT&T and JMC, according to which AT&T was to provide-calling-card services to JMC. JMC allegedly became delinquent on its payments for those

services, and AT&T filed a complaint seeking to recover unpaid usage charges in June 1999. JMC filed a counterclaim alleging, *inter alia*, that AT&T:

(1) committed common law fraud (Count 2);

(2) violated sections 349 and 350 of New York's General Business Law ("GBL") (Count 4);

(3) filed a "sham" complaint in furtherance of its anti-competitive conduct in violation of § 1 of the Sherman Act (Count 6); and

(4) conspired to restrain trade in violation of § 1 of the Sherman Act (Count 6); and

For the reasons stated, AT&T's motion is granted.

BACKGROUND

AT&T, among other services, provides telecommunications network services to companies that sell prepaid calling cards. (Counterclaim at ¶ 3). JMC, which is no longer in business, was a limited liability company engaged in the design, marketing, and sale of prepaid calling cards. (*Id.* at ¶ 2.) In September 1998, AT&T and JMC entered into a contract. (Pl.'s Br. at 1.) According to the contract, AT&T would supply calling card services to JMC, which would distribute those services to end user customers by selling calling cards to them. (*Id.*) JMC claims that AT&T

restricted JMC's sales territory for the calling cards to the maritime market.[1] (Def.'s Br. at 5.)

AT&T claims that JMC became delinquent on AT&T's bills for the services it had provided. (Pl.'s Br. at 1.) Therefore, AT&T filed a complaint seeking to recover unpaid usage charges, in June 1999. (*Id.*) JMC filed a counterclaim, asserting that AT&T had not performed in accordance with the agreement. (Counterclaim at ¶ 6-33.). Specifically, JMC alleges that AT&T, *inter alia*, sent JMC calling cards with the wrong denominations and calling cards which were not activated. (*Id.* at ¶ 9-10.) JMC further asserts that AT&T provided inferior and inadequate customer and technical service and generally failed to provide the "world class service that is expected from AT&T." (*Id.* at ¶¶ 13-14, 16.) JMC claims that these actions amounted to common law fraud and, consumer fraud under sections 349 and 350 of the New York General Business Law. Finally, JMC alleges that AT&T violated the Sherman Act by conspiring to restrain trade and filing a sham complaint in furtherance of its anti-competitive conduct.[2] 15 U.S.C. § 1.

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1. This requirement is neither contained in the contract, nor in the addendum to the contract. During oral argument, JMC's counsel stated that this restriction is contained in some other document. Counsel did not further specify which document that might be.

2. JMC also brings claims of breach of contract and breach of the covenant of good faith and fair dealing. (Counterclaim at ¶¶ 34-37, 47-48.) These claims are not part of AT&T's motion.

Appendix E

DISCUSSION

I. *Standard for 12(b)(6) Motion to Dismiss*

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted does not attack the merits of the case, but merely tests the legal sufficiency of the complaint. *Sturm v. Clark*, 835 F.2d 1009, 1011 (3d Cir. 1987). When considering such a motion, the reviewing court must accept as true all well-pleaded allegations in the complaint and view them in the light most favorable to the plaintiff. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir. 1985); *Rogin v. Bensalem Twp.*, 616 F.2d 680, 685 (3d Cir. 1980). A court may not dismiss the complaint "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Copley v. Gibson*, 355 U.S. 41, 45-46 (1957).

In considering the motion, a district court must accept as true the facts pleaded in the complaint and any and all reasonable inferences derived from those facts. *Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1400 (3d Cir. 1991); *Glenside W. Corp. v. Exxon Co.*, 761 F. Supp. 1100, 1107 (D.N.J. 1991); *Gutman v. Howard Sav. Bank*, 748 F. Supp. 254, 260 (D.N.J. 1990). It is not necessary for the plaintiff to plead evidence, and it is not necessary to plead the facts that serve as the basis for the claim. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977); *In re Midlantic Corp. S'holder Litig.*, 758 F. Supp. 226, 230 (D.N.J. 1990). Legal conclusions offered in the guise of

factual allegations, however, are given no presumption of truthfulness. *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

The question before the court is not whether the plaintiff will ultimately prevail; rather, it if whether the plaintiff can prove any set of facts in support of the asserted claims that would entitle the plaintiff to relief. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). Although the Federal Rules of Civil Procedure do not dictate that a "claimant set forth an intricately detailed description of the asserted basis for relief, they do require that the pleadings give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 149-50 n.3 (1984) (citing *Conley*, 355 U.S. at 47).

II. *Common Law Fraud Claim*

The elements of a common law fraud claim in both New Jersey and New York are (1) a material misrepresentation *of an existing or past fact*; (2) knowledge or belief by the defendant of its falsity; (3) an intention that the other person rely on it; (4) reasonable reliance thereon; and (5) resulting injury. *Eli Lilly & Co. v. Roussal Corp.*, 23 F. Supp. 2d 460, 492 (D.N.J. 1998) (citing *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 610 (1971)); *Kaye v. Grossman*, 202 F.3d 611, 614 (2d Cir. 2000). Statements pertaining to possible future events, expectations or probabilities, even if they should turn out to be wrong, do not constitute misrepresentations and, thus, do not support a fraud claim. *Alexander v. CIGNA Corp.*, 991 F. Supp. 427, 435 (D.N.J.), *aff'd*, 172 F.3d 859 (3d Cir. 1998). Promises can only constitute misrepresentations for

fraud purposes if the claimant can demonstrate that at the time the alleged material misrepresentations were made, the promisor had no intention of performing its promises. *Silvestre v. Bell Atl. Corp.*, 973 F. Supp. 475, 485 (D.N.J. 1997).

JMC alleges that AT&T committed common law fraud by failing to fulfill its promises under the contract to (1) be the exclusive carrier of telecommunications network services used by JMC's customers; (2) provide good technical and customer service; and (3) cooperate with JMC in the event of a business downturn beyond JMC's control. (Counterclaim at ¶¶ 39, 42, 43.) These allegations do not state a claim of fraud, because JMC has not demonstrated that AT&T made a material misrepresentation of *a past or existing fact.* (Pl.'s Br. at ¶ 18.) *Eli Lilly*, 23 F. Supp. at 492; *Kaye*, 202 F.3d at 614. Moreover, JMC does not contend that, at the time the contract was formed, AT&T knowingly made false statements about future services. Therefore, we will dismiss JMC's common law fraud claim without prejudice.[3] However, if JMC still seeks to assert a common law fraud claim against AT&T, we will grant thirty (30) days leave to amend the complaint to state so more clearly and in compliance with Federal Rule of Civil Procedure 9(b).

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3. AT&T alternatively alleges that even if JMC had asserted a valid common law fraud claim, it would still have failed to comply with Federal Rule of Civil Procedure 9(b), according to which "circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). However, because of our disposition of the common law fraud claim, this issue is moot.

Appendix E

III. *Violation of the GBL Claim*

JMC further alleges that "AT&T engaged in fraudulent and deceptive acts and practices in violation of the GBL. Section 349(a) of the GBL prohibits "deceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state."[4] According to section 349(h) of the GBL, "any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages, . . . or both."

Sections 349 and 350 are directed at wrongs against the consuming public. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bark*, 85 N.Y.2d 20, 24, 647 N.E.2d 741 (1995). "Consumers have the right to an honest market place where trust prevails between buyer and seller." *Id.* at 25. Thus, to establish a prima facie case under section 349, plaintiffs must first allege consumer-oriented conduct having a broad impact on consumers at large. *Id.* A typical violation of the statute would involve an individual consumer who falls victim to a seller's misrepresentations, usually by false advertising. *Genesco Entm't v. Koch*, 593 F. Supp. 743, 750 (S.D.N.Y. 1984). On the other hand, private contract disputes, unique to the parties, would not fall within the ambit of the statute. *Id.* at 752. Second, a prima facie case requires a showing that a defendant has engaged in a materially deceptive or misleading act or practice and that a plaintiff

4. Section 350 states that "false advertising in the conduct of any business, trade or commerce in the furnishing of any service in this state is hereby declared unlawful." N.Y. Gen. Bus. Law § 350.

has been injured by it. *Id.* (citing *Varela v. Investors Ins. Holding Corp.*, 81 N.Y.2d 958, 961 (1993)).

JMC alleges that AT&T engaged in "unfair competition and deceptive acts and practices in the conduct of business under New York GBL sections 349 and 350." (Def.'s Br. at 28.) According to JMC, these acts consisted of, *inter alia*, "a failure to provide purchasers of the ... card[s] with the full-allotment of minutes, rounding off minutes, charging for uncompleted calls and "dead air" time, and activating cards prematurely."(*Id.*) JMC contends that these acts had a broad impact on consumers at large and, as a result, countless consumers were injured and defrauded. (*Id.*) Further, JMC alleges that sections 349 and 350 are applicable to inter-business disputes, even in the absence of an allegation that defendant's practices were "deceptive as to the public." *Sulner v. Gen. Accident Fire & Life Assur. Corp.*, 471 N.Y.S.2d 794, 797 (Sup. Ct. 1984).[5]

AT&T counters that JMC's claim under section 349 should be dismissed because JMC has not alleged any consumer injury or deception committed by AT&T in New York. (Def.'s Br. at 20.) According to AT&T, any allegations of consumer injury JMC has made are too vague to state a claim of injury to the public in general.

Oboler v. Ins. Co. of N. Am., 1994 WL 414438 at *3 (S.D.N.Y. August 5, 1994). AT&T points out that the New York customers to whom JMC refers are not AT&T's but

5. We do not find the reasoning in this case convincing, and decline to follow it.

JMC's customers, and that AT&T is, therefore, not responsible for any injury to them. Further, AT&T notes that even if JMC had sustained any injuries as a result of AT&T's conduct, section 349 is inapplicable to the inter-business dispute between. AT&T and JMC because it was not intended to cover situations involving "complex arrangements, knowledgeable parties and large sums of money." *Id.* We find AT&T's arguments and precedent convincing and therefore will grant that part of the motion that seeks dismissal of JMC's claim under sections 349 and 350 of the GBL.

IV. *Sham Complaint Claim*

JMC asserts that AT&T's complaint seeking to recover allegedly unpaid moneys due under the contract is "a sham complaint which was filed . . . in 'a race to the courthouse' in furtherance of AT&T's illegal acts in violation of § 1 of the Sherman Act." A sham complaint is defined as one that is brought merely to harass the defendant. Therefore, a party alleging an antitrust claim against a plaintiff must make a threshold showing of "objective baselessness." *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 122-23 (3d Cir. 1999).

JMC has not shown that AT&T's complaint was "objectively baseless" and that "no reasonable litigant could realistically expect success on the merits," as required by *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 60-61 (1993). Rather, AT&T has brought a collection action on a book account, alleging that JMC

failed to pay its bills under the contract.[6] JMC admits that it received AT&T's bills, but denies owing anything. These facts show that AT&T's complaint is not "objectively baseless" or is designed solely to advance some anti-competitive goal. Therefore, JMC has failed to state a claim with respect to its sham complaint count, and the part of the motion seeking dismissal of this claim will be granted.

V. *Antitrust Claim: Violation of 15 U.S.C. § 1*

A. *AT&T's Refusal to Lower Prices and Grant Discounts*

Section 1 of the Sherman Act provides that "every contract, combination in the form of trust or otherwise; or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Accordingly, liability under this section requires some form of concerted action, defined as "a conscious commitment to a common scheme designed to achieve an unlawful objective." *In re Baby Food Litig.*, 166 F.3d 112, 117 (3d Cir. 1999). Without a meeting of minds in an unlawful arrangement, there can be no § 1 liability. *Id.* Unilateral acts are insufficient to sustain a claim under § 1. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). Therefore, in cases involving vertical arrangements, a provider of goods or services may independently bargain for terms affecting the price of the goods or services without incurring liability. *Id.* at 761.

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6. According to AT&T, JMC owes a total amount approaching two million dollars.

Appendix E

The agreement between AT&T and JMC contains an addendum, which provides that.

> [i]n the event of a business downturn beyond the customer's [(JMC's)] control, which significantly reduces the volume of network services required by the customer, with the result that customer will be unable to meet its . . . volume commitments under the Agreement (notwithstanding customer's best efforts to avoid such a shortfall), AT&T and customer will cooperate in efforts to develop a mutually agreeable alternative proposal that will satisfy the concerns of both parties.

Addendum.

JMC asserts that AT&T violated § 1 by refusing JMC's request for lower rates and discounts after a downturn in the market. Further, AMC alleges that it was forced to be an unwilling participant in AT&T's market division scheme.[7] According to JMC, it can, therefore, maintain a conspiracy claim, because concerted action designed to restrain competition existed. We disagree.

"The antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the *manufacturer and others.* [not the plaintiff] had a conscious commitment to a common scheme designed to

7. "JMC was . . . contractually committed to AT&T to purchase $64,000,000 worth of services over a 3 year period. The risk of arousing AT&T's ire was a risk JMC could not afford to take." (Def.'s Br. at 11.)

achieve an unlawful objective." *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 374 (3d Cir. 1985) (emphasis added) (citing *Monsanto*, 465 U.S. 752). Conversely, the United States Supreme Court has held that when a dealer unwillingly complies with a supplier's demand, no agreement for purposes of § 1 exists. *See Monsanto*, 465 U.S. at 761.

AT&T claims that its conduct constituted a unilateral act and, therefore, did not violate § 1. We agree. AT&T is not liable under § 1 because it has a right to act independently in setting wholesale rates and discount structures. *Id.* at 764. Thus, AT&T's actions cannot, as a matter of law, constitute an antitrust "conspiracy." *See id.* Therefore, we will grant that part of the motion that requests dismissal of JMC's antitrust claim with respect to the setting of wholesale rates and discount structures.

B. *AT&T's Restriction of JMC Card Sales to the Maritime Market*

JMC alleges that AT&T prohibited JMC from selling its Latitude Cards[8] to non-maritime customers.[9] AT&T allegedly did this with the purpose of eliminating JMC as a competitor and unreasonably restraining competition in the prepaid

8. The parties refer to the prepaid calling cards for which AT&T provided the telecommunication service as "Latitude Cards." (*E.g.* Def.'s Br. at 5.)

9. However, there is no allegation that this restriction was either incorporated into the agreement between JMC and AT&T, or that it injured competition.

calling card market. JMC again alleges that its unwilling participation in this scheme met the § 1 threshold requirement of concerted action.

As discussed *supra*, in part V.A., when *a* dealer unwillingly complies with a supplier's demand, no agreement for purposes of § 1 exists. *See Monsanto*, 465 U.S. at 761. In addition, according to AT&T, JMC's counterclaim should be dismissed because the alleged restriction on selling AT&T services is a vertical, non-price restraint by the supplier (AT&T) on the market in which its distributor (JMC) can resell. AT&T alleges that such conduct should be analyzed under the rule of reason.[10] *Bus. Elecs. Corp., v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988). Moreover, the restrictions AT&T allegedly imposed on the distribution of Latitude Cards might affect intrabrand competition, but could not affect intrabrand competition among other carriers which also provided calling-card services either directly or through distributors. The United States Supreme Court has held that vertical, non-price restraints affecting intrabrand competition are analyzed under the rule of reason. *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, at 51-59 (1977).

JMC points out that "the horizontal division of customers or geographical markets has traditionally been held to be

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10. Most antitrust claims do not constitute *per se* violations of § 1, but are analyzed under the rule *of reason, which* requires the courts to determine whether a practice imposes an unreasonable restraint on competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1998). However, during oral argument 3MC stipulated that it would not bring a claim under the rule of reason, even if its *per se* violation claim was denied. Therefore, any further analysis of this claim according to the rule of reason is unnecessary.

illegal *per* se under § 1 of the Sherman Act." *U.S. v. Topco Assoc.*, 405 U.S. 596 (1972); *U.S. v. Sealy, Inc.*, 388 U.S. 350 (1967). JMC alleges that AT&T's requirement not to sell the Latitude Cards outside of the maritime market constitutes a horizontal division of customers or markets. AT&T, on the other hand, claims that its relationship with JMC was vertical rather than horizontal because they were supplier and distributor.

Topco and *Sealy* are distinguishable from this case. In both of those cases, the defendants were licensees and competed directly against each other. *Topco*, 405 U.S. at 596; *Sealy*, 388 U.S. at 351. In *Topco*, a number of small, local supermarket chains had obtained licenses to purchase Topco brand products.[11] *Id.* at 599. In order to obtain the licenses, the licensees had to agree to divide the market by limiting their respective sales territories geographically. *Id.* at 601. The Court held that an agreement between competitors at the same level of the market structure to allocate territories, in order to minimize competition, was a horizontal restraint and, therefore, a classic example of a *per se* violation of § 1. *Id.* at 608. *Sealy* also pertained to a horizontal restraint, but the Court remarked that "vertical restraints were not embraced within the condemnation of horizontal territorial limitations." *Sealy*, 388 U.S. at 354.

JMC alleges that AT&T's refusal to allow JMC to distribute the Latitude Cards outside of the maritime market

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11. Topco is a private label which is only available in certain licensed stores, similar to better known private labels such as the A&P or Shop-Rite brands.

constituted a horizontal restraint on competition because it divided the market into maritime and non-maritime portions. However, JMC has not cited any convincing precedent for the proposition that this relationship was horizontal rather than vertical. According to the case law, AT&T was not JMC's competitor on the same level, but rather its supplier of services. Thus, a vertical relationship existed between them. Restraints imposed by agreement between firms at different levels of distribution are characterized as vertical restraints. *Elecs. Communication Corp. v. Toshiba Am. Consumer Prods.*, 129 F.3d 240, 243 (2d Cir. 1997) (citing *Bus. Elecs*, 485 U.S. at 730). And absent price fixing between a supplier and a distributor, vertical restraints are generally not considered to be *per se* violations of § 1. *Elecs. Communication*, 129 F.3d at 243. This is true even in the case of dual distribution arrangements, where a distributor and manufacturer also compete at the distribution level.[12] *Id.*

AT&T provided calling card services to JMC so that JMC could sell calling cards in the maritime market. At the same time, it also distributed its own calling cards in the same market. *Electronics Communications* is, therefore, directly on point and we find that the restraint on JMC was vertical rather than horizontal[13] As a result, we will dismiss that part

12. A dual distribution agreement exists, for example, where the manufacturer distributes its products both through a distributor and independently.

13. Even if we were to find that the relationship was horizontal, JMC still has not alleged that a division of the market existed. While

(Cont'd)

of AT&T's motion which pertains to the antitrust claim based on the alleged market division.

CONCLUSION

For the reasons stated, plaintiff's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) will be granted in part and denied in part.

IT IS THEREFORE, on this 21st day of March, 2003 **ORDERED** that plaintiff's motion to dismiss counts 2, 4, 5, and 6 of defendant's counterclaim (no. 66-1 on the docket) be and hereby is **GRANTED**; and

IT IS FURTHER ORDERED that defendant's counterclaims alleging violations of (1) sections 349 and 350 of the New York General Business Law; (2) the Sherman Act by filing a sham complaint; and (3) § 1 of the Sherman Act by conspiring to restrain trade be and hereby are **DISMISSED WITH PREJUDICE**; and

IT IS FURTHER ORDERED that defendant's common law fraud claim be and hereby is **DISMISSED WITHOUT PREJUDICE**; and

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(Cont'd)

AT&T allegedly prohibited JMC from distributing the Latitude Cards outside of the maritime market, there is no evidence that AT&T had any intention of staying out of that market itself. Therefore, no true division of markets existed.

Appendix E

IT IS FURTHER ORDERED that defendant is granted leave to file an amended complaint pleading common law fraud more clearly and with the specificity required under Federal Rule of Civil Procedure 9(b), within thirty (30) days of the entry of this order; and

IT IS FURTHER ORDERED that if said amended complaint is not filed within thirty (30) days of the entry of this order, defendant's common law claim will be **DISMISSED WITH PREJUDICE.**

s/ Mary L. Cooper
MARY L. COOPER
United States District Court

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED JANUARY 3, 2007

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-1304

AT&T CORP.

v.

JMC TELECOM, LLC,

Appellant

Before: SCIRICA, *Chief Judge,* McKEE, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, *GREENBERG and *ROTH, *Circuit Judges* and *BUCKWALTER, *District Judge.*

ORDER

The petition for rehearing *en banc* filed by the Appellant, JMC Telecom, LLC, in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred

* Votes limited to panel rehearing only.

in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc,* the petition for rehearing is denied.

By the Court,

/s/ JANE R. ROTH
JANE R. ROTH
Circuit Judge

Gil D. Messina, Esq.
Joseph M. Alioto, Esq.

Dated: January 3, 2007

APPENDIX G — RELEVANT STATUTES

Title 15 United States Code, Section 1.[1]

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Title 15 United States Code, Section 15(a).

Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his

[1] This is Section 1 of the Sherman Act that was in effect at the time JMC's counterclaim was filed. The penalty provisions were later amended on June 22, 2004, increasing the maximum fines to $100,000,000 for a corporation and $1,000,000 for any other person. The maximum term of imprisonment was increased to 10 years. 118 Stat. 661, 668.

business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's

representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

Title 15 United States Code, Section 26.

Injunctive relief for private parties; exception, costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger or irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, that nothing herein contained shall be construed to

entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Title 47 United States Code, Section 152.

Application of [Federal Communications] Act [of 1934]

(a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to persons engaged in wire or radio communication or transmission in [the Philippine Islands or] the Canal Zone, or to wire or radio communication or transmission wholly within [the Philippine Islands or] the Canal Zone. The provisions of this Act shall apply with respect to cable service, to all persons engaged within the United States in providing such service, and to

the facilities of cable operators which relate to such service, as provided in title VI.

Title 47 United States Code, Section 414.

Exclusiveness of Act

Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

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No. 06-1314

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IN THE

Supreme Court of the United States

JMC TELECOM, L .C,

Petitioner,

v.

AT&T CORP.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The decision below raises none of the questions the petition purports to present. In claiming otherwise, petitioner mischaracterizes the Third Circuit's rulings on petitioner's breach of tariff and antitrust claims, and also misstates the allegations underlying petitioner's antitrust claims.

Petitioner's claim that the Third Circuit deemed a tariff commitment "unenforceable because the customer's claim relates to the quality of service," Pet. at 6, is patently untrue. Citing a tariff provision in which AT&T represented that it would use no "participating carriers" in providing service, petitioner argued that AT&T had breached a promise to provide service "*only* over AT&T facilities." *Id.* (emphasis added). The Third Circuit did not deem this tariff commitment unenforceable. It found that AT&T's use of a local Philippine carrier to complete calls to that country did not violate the tariff, because the local carrier was not a "participating carrier," as the Federal Communications Commission (FCC) has construed that regulatory term of art. This decision is unassailably correct, and raises no issues warranting this Court's review.

Petitioner also claimed that AT&T had breached alleged contractual commitments by failing to provide "world class" service or adequate customer support. See Pet. App. 10a-11a. These alleged promises, however, are not in the tariff, and the Third Circuit held that *non-tariffed* commitments are unenforceable under the filed tariff doctrine. This ruling does not conflict with this Court's decision in *American Telephone & Telegraph Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214 (1998), but rather was compelled by that decision.

As for its antitrust claims, petitioner simply ignores concessions it made below that fatally undermine those claims. It insists that it was "not a distributor of AT&T's telecommunications service," Pet. at 10. But petitioner told

the Third Circuit precisely the opposite, and properly so: petitioner not only re-sold AT&T service, it used the AT&T brand to market its cards, and it was entitled to advise customers that the service was provided over AT&T facilities. Based on petitioner's concession that it was a distributor of AT&T service, the Third Circuit properly held that the alleged maritime market restriction was a vertical, non-price restraint and thus not subject to *per se* analysis under the Sherman Act.

Petitioner also claims that, in affirming the dismissal of its market division claim, the Third Circuit failed to accept allegations that this alleged restriction resulted from concerted action. But the Third Circuit did not deem the alleged market division a unilateral act. Rather, it affirmed dismissal of a *different* antitrust claim—one petitioner predicated on AT&T's refusal to lower rates—as a legally invalid challenge to permissible unilateral action.

BACKGROUND

1. Petitioner was a novice company engaged in marketing and distributing prepaid calling cards. A prepaid calling card gives end-users a preset amount of telecommunications service. Under its business plan, petitioner would purchase such service (at a bulk discount) from facilities-based carriers, then sell prepaid cards for that service to retailers in the maritime sector, who would sell the cards to end-users.

In September 1998, petitioner agreed to purchase AT&T prepaid calling card service. Petitioner executed a "Contract Tariff Order Form," which incorporated by reference AT&T's Tariff No. 1. After receiving this order form, AT&T filed Contract Tariff No. 10344 with the FCC. The Contract Tariff established the price for the calling cards and associated service, and gave petitioner a 35% discount on each purchase. In exchange, petitioner agreed to purchase a minimum amount of service for each of the three years the Contract Tariff would be in effect. Petitioner further agreed that if it

failed to sell the required amount of service, it would pay a "shortfall" penalty.

Between September and December 1998, petitioner sold more than $1 million in prepaid calling cards using AT&T service. During the first weeks of the service, however, some end-users reported problems, typically in completing a call to the Philippines.[1] As petitioner acknowledged, these service issues were resolved by December 1998.

The difficulty in completing these calls resulted from problems in the network of the local Philippine carrier AT&T had contracted with to complete calls in that country. Because AT&T could not (and still cannot) complete calls throughout the world using only its own facilities, AT&T had to rely on other carries to complete calls. For example, even for domestic calls, AT&T typically handed off the call to a local exchange carrier, such as Verizon, for completion. For calls to a foreign country, AT&T routed the call to another carrier for completion in that foreign country.

Although historically AT&T had been required to use monopoly carriers in many countries, several of these markets became competitive in the 1990s. This created opportunities for low-cost routing, and the FCC encouraged carriers to take advantage of these opportunities to reduce rates to consumers. *In re International Settlement Rates*, 12 FCC Rcd. 19806, ¶¶ 9-12 (1997), *aff'd sub nom. Cable & Wireless PLC* v. *FCC*, 166 F.3d 1224 (D.C. Cir. 1999). The call completion difficulties petitioner's end-users experienced resulted from AT&T's use of one such low-cost carrier in the Philippines, Pacific Gateway Exchange ("PGE").

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[1] Petitioner also claimed that AT&T's customer service was not sufficiently responsive; that certain instructions on the cards were not accurate; that some cards lacked a "product code"; and that a handful of cards were being charged even though the call supposedly did not connect.

Although AT&T engaged carriers, such as PGE, to complete calls, those carriers did not bill petitioner or its end-users or assume responsibility to those customers for any aspect of the service. Instead, AT&T alone billed for the calls at issue in this case. And AT&T was solely responsible for the "end-to-end" service offered under its own tariffs.

Between September 1998 and March 1999, petitioner ordered service for 258,000 prepaid cards, and received invoices totalling $2,375,750.75. Petitioner paid AT&T only $400,000. In February 1999, petitioner decided that it would make no further payments to AT&T, but did not tell AT&T. Thereafter, petitioner activated additional cards and tried to order 100,000 additional PINs (*i.e.*, cards) in late April 1999. Consistent with its tariffed rights, AT&T refused to provision the latter order until petitioner paid its bill. Petitioner made no payment and, in June 1999, AT&T sued for the unpaid tariffed charges. Petitioner subsequently counter-claimed. When petitioner later failed to meet its annual revenue commitment for the first year, AT&T assessed shortfall charges, which petitioner also failed to pay.

2.a. In March 2003, the district court granted AT&T's motion to dismiss that portion of petitioner's counterclaim that alleged a conspiracy to restrain trade in violation of § 1 of the Sherman Act. Accepting petitioner's factual allegations as true, the district court found that petitioner had not alleged a conspiracy or concerted action necessary to state a *per se* Section 1 claim. Instead, it found that petitioner alleged unilateral conduct involving a vertical, non-price "restraint" that could not give rise to a *per se* violation of the Sherman Act. Pet. App. 57a-62a.

After discovery, the district court granted AT&T summary judgment on petitioner's surviving counterclaims and on AT&T's affirmative claims. The court concluded that petitioner's state-law claims for breach of contract, fraud, negligent misrepresentation, and breach of the covenant of good faith and fair dealing were preempted by the

Communication Act and barred by the filed tariff doctrine. The court noted that petitioner's "state-law claims in effect challenge the reasonableness of the filed rate by challenging, *inter alia*, the quality of service provided. This is precisely the type of challenge the filed rate doctrine prevents." *Id.* at 28a-31a.

The district court likewise dismissed petitioner's federal breach of tariff claims. Many of these claims rested on alleged breaches of promises "that do not appear in either Tariff No. 1 or the Contract Tariff," and were therefore unenforceable. *Id.* at 32a. The court also concluded that AT&T's use of PGE to transport calls to the Philippines did not breach its representation in the Contract Tariff that there would be no "participating carriers" involved in the service. The court ruled that a "participating carrier" is not a carrier that simply has some role in the completion of a call, as petitioner claimed, but is instead a "'carrier subject to the [FCA] that publishes a tariff containing rates and regulations applicable to the portion o[f] through service it furnishes in conjunction with another subject carrier.'" *Id.* at 33a (first alteration in original) (quoting 47 C.F.R. § 61.3(z)). The court found that PGE did not satisfy the regulatory definition of a participating carrier because it did not provide service to petitioner's customer pursuant to a published tariff; rather, it provided service to AT&T pursuant to a contract with AT&T. *Id.*

Finally, the court found that petitioner's claims that AT&T violated seven other tariff provisions failed as a matter of law, because these provisions did not promise petitioner any particular quality of service (such as a particular call completion rate), as petitioner mistakenly believed. *Id.* at 34a-37a.[2] In the absence of any breach of an express tariff

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[2] The district court held that one provision of the tariff did guarantee that petitioner's customers would have "foreign origination capability,"

provision, petitioner's complaints regarding poor service were "functionally equivalent to a claim of unreasonable rates" and thus barred under the filed tariff doctrine. *Id.* at 31a-32a (citing *Central Office Tel.*, 524 U.S. at 223).

The district court granted AT&T summary judgment on its claim against petitioner for failure to pay nearly $2 million in billed, tariffed services, and approximately $5.6 million in billed, tariffed shortfall charges. The court rejected petitioner's claim that it was not obligated to pay because of AT&T's alleged breaches, ruling that a "state common-law contract defense" could not "excuse[] performance of a filed federal tariff." *Id.* at 41a. Moreover, these purported excuses were based on promises outside the tariff and were therefore barred under the filed tariff doctrine. *Id.*

b. The Third Circuit affirmed. It noted that petitioner had asserted "two violations of the Sherman Act," the first based on AT&T's "refus[al] to lower the rates assessed" petitioner, and the second based on an alleged "scheme to divide the market between maritime and non-maritime customers." *Id.* at 6a-7a. The Third Circuit dismissed the first of these claims—*i.e.*, AT&T's allegedly unlawful refusal to lower its rates—because petitioner had "not alleged action by other distributors in concert with AT&T." *Id.* at 7a. Instead, petitioner had "alleged only unilateral action by AT&T," which could "not serve as a violation of the Sherman Act." *Id.* at 7a-8a (citing *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984)). With respect to petitioner's second claim, the lower court held that, insofar as AT&T had allegedly restricted petitioner to selling AT&T service in the maritime market, this was a "[v]ertical, non-price restraint[]" imposed by a supplier and therefore subject to rule of reason analysis, not *per se* condemnation. *Id.* at 8a-9a.

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but found that petitioner's own evidence established that AT&T had met this commitment. Pet. App. 32a-33a.

Turning to petitioner's breach of tariff claims, the Third Circuit noted that many were based on claims that AT&T had failed to provide "'world class dependability'" or had provided "poor customer service." *Id.* at 10a. The court of appeals held that these claims were barred by the filed tariff doctrine, because petitioner was claiming an entitlement to a level of service that was "not spelled out in the tariff" itself. *Id.* at 11a. Among the claims so barred was petitioner's contention that AT&T had failed to provide foreign origination capability. The record demonstrated that customers' difficulty in placing such calls stemmed from a lack of proper written instructions on the cards concerning how to make them. The court of appeals held that "[t]he quality of the written instruction on the card, and the corresponding 'ease of use,' is beyond the terms of the tariff," and thus barred by the filed tariff doctrine. *Id.* at 12a.

By contrast, to the extent petitioner claimed that AT&T had breached a tariffed promise not to use any "participating carriers," the Third Circuit did not deem the promise unenforceable. It ruled instead that AT&T had not actually breached it. Because "participating carrier" is a regulatory term of art, the court looked to the FCC definition and a series of agency decisions applying the term. From this, it concluded that a "participating carrier" arrangement is an "'end-on-end' service arrangement . . . in which each carrier participating establishes a separate rate for its segment of the service." *Id.* at 14a. Such an arrangement differs from an "end-to-end" arrangement in which a carrier establishes "a rate for the entire transmission and the customer pays a single uniform rate to one carrier for completing a call." *Id.*

The court concluded that this FCC interpretation deserved *Chevron*-style deference. *Id.* at 15a. Applying that meaning here, the court found that PGE was not a participating carrier because it "did not publish a rate applicable to the portion of through service it provided to AT&T for [petitioner's] traffic"; instead, AT&T charged petitioner's customers a

single end-to-end rate that was "not a direct function of [PGE's] price." *Id.* at 14a-15a. Accordingly, PGE "was not an 'other participating carrier,' and, consequently, AT&T did not violate the tariff by failing to list [PGE]" as one. *Id.* at 15a.

Finally, the court of appeals affirmed the grant of summary judgment to AT&T on petitioner's state law claims and AT&T's claim for non-payment. It agreed that petitioner's state law claims were barred by the filed tariff doctrine, as were its excuses for not paying accurate tariffed charges. *Id.* at 16a-17a. Petitioner's subsequent petition for rehearing en banc was denied without dissent. *Id.* at 64a-65a.

REASONS THE PETITION SHOULD BE DENIED

The Third Circuit's entirely correct and fact-bound rulings in this case are based on well-settled legal principles, do not conflict with the decisions of this or any other court, and raise no issues worthy of review. Indeed, the decision does not even raise the three issues petitioner seeks to present.

1. According to petitioner, the Third Circuit ruled that "a carrier is immune when it fails to provide the service *specified in the tariff* because the customer's complaint relates to the quality of service." Pet. at 6 (emphasis added). Based on this characterization of the decision below, petitioner describes the first question presented as whether a carrier's "failure to deliver the specific brand of service *called for in a filed tariff* is unenforceable because the customer's claim relates to the quality of service." *Id.* (emphasis added). But as even a cursory review of the decision below makes clear, the Third Circuit announced no such principle.

Throughout the proceedings below, petitioner made the utterly implausible claim that AT&T had guaranteed that calls "would be handled over AT&T's telecommunications network *exclusively*." Appellant's Op. Br. at 10, *AT&T Corp. v. JMC Telecom, LLC*, No. 05-1304 (filed May 9, 2005)

("JMC Br.") (emphasis added). Petitioner principally argued that AT&T provided this "assur[ance]" (as well as alleged guarantees of a 99.99% call completion rate) in oral agreements. See *id.* Both lower courts recognized, however, that the filed tariff doctrine bars enforcement of alleged oral promises precisely because they purport to guarantee a level of service that is *not* "specified in the tariff." Petitioner does not challenge that ruling, which is compelled by *Central Office Telephone*.

Apparently recognizing the fatal import of *Central Office Telephone*, petitioner also sought to ground its "exclusive network" claim in the language of the tariff itself. Just before the close of discovery, it claimed that AT&T's representation in the Contract Tariff that there would be no "participating carriers" constituted a promise to complete calls exclusively over the AT&T network. The Third Circuit did not suggest that this tariffed promise was unenforceable or that AT&T could breach it with impunity because it related to the quality of service. Rather, the court concluded that PGE was not a "participating carrier" within the meaning of that term and that AT&T's use of this local carrier did not breach the tariff.

This conclusion—which petitioner does not even mention let alone challenge—is plainly correct, and flatly refutes petitioner's claim that "the service *specified in the tariff*" required AT&T to complete calls entirely over its network.[3] The reality, which petitioner refuses to acknowledge, is that the Third Circuit did not deem any tariffed promise "unenforceable." It simply concluded that the tariff did not

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[3] Nor can such a promise be derived from the tariff provision permitting resellers to inform customers "that calls placed using the AT&T Prepaid Card account number will be carried over AT&T's facilities." *See* JMC Br. at 24 (quoting tariff provision § 2.2.5). This provision does not state that calls would be carried *exclusively* over AT&T facilities, which is likely why petitioner did not even cite this provision in opposing AT&T's motion for summary judgment in the district court, and thereby waived the claim below.

promise the level of service to which petitioner claimed to be entitled. Accordingly, the decision does not raise the first question petitioner purports to present.

2. Nor does that decision raise either of the antitrust issues petitioner asks this Court to address. Both claims depend on petitioner's assertion that it "was not a distributor of AT&T's telecommunications service under the antitrust laws." Pet. at 10. But this assertion is demonstrably wrong. Petitioner's Counterclaim stated that AT&T provided the prepaid telecommunications service, and that JMC distributed cards with that service. JMC Counterclaim ¶¶ 2, 3 and 6. Petitioner repeatedly told the Third Circuit that it was a "wholesaler" and "distributor" of AT&T's service. JMC Br. at 10, 15, 51. Indeed, its cards were "co-branded with AT&T's . . . logo," *id.* at 15; see also *id.* at 9 (noting that the "AT&T logo is imprinted on the phone card"), and it was entitled to "inform its subscribers that calls placed using the AT&T Prepaid Card account number will be carried over AT&T's facilities." *Id.* at 24 (internal quotation marks omitted).

Accordingly, the Third Circuit was plainly correct in ruling that any alleged market restriction was a vertical, non-price restraint imposed by a supplier, Pet. App. 8a-9a, not a division of markets by horizontal competitors. As the Third Circuit noted, other circuits and the Department of Justice uniformly agree that where a supplier and distributor compete at the distribution level, vertical non-price restraints are not *per se* unlawful and are instead analyzed under the rule of reason. *Id.* at 9a. And that uniform approach is consistent with this Court's admonition that courts should be slow "to extend *per se* analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986).

The alleged marketing restriction at issue here, moreover, is vastly different from the allocation of markets deemed

unlawful in *Palmer* v. *BRG of Georgia, Inc.*, 498 U.S. 46 (1990) (per curiam). That case involved an agreement in which "the two main providers of bar review courses in Georgia" agreed to stop competing against each other in that market. Instead, BRG became the exclusive licensee of HBJ's bar review program in Georgia, HBJ agreed that it would not compete with BRG in Georgia, and BRG agreed not to compete with HBJ outside Georgia. *Id.* at 47. As a result of this agreement, there was a direct loss of inter-brand competition, both inside and outside of Georgia. Here, by stark contrast, the alleged restriction resulted in no loss of inter-brand competition. Instead, a novice company that had never competed anywhere was permitted to introduce *intra*brand competition in AT&T calling card service in one market, but allegedly prevented from introducing *intra*brand competition outside that market. The Third Circuit's refusal to subject such an alleged restriction to *per se* condemnation does not conflict with *Palmer* or any other decision of this Court, is consistent with the uniform approach of other circuits, and raises no issues warranting review.

Finally, the decision below does not raise the third question petitioner purports to present, for the simple reason that the Third Circuit did not affirm dismissal of petitioner's market division claims based on a conclusion that this alleged restriction involved only unilateral action. Instead, as noted above, the lower court affirmed the dismissal of a *separate* antitrust claim—one that petitioner is no longer pressing—because the conduct underlying this distinct claim (AT&T's refusal to lower its rates) was unilateral, and because, as to this refusal, petitioner had "not alleged action by other distributors in concert with AT&T." Pet. App. 7a. Thus, this case presents no opportunity to decide "whether an agreement imposed by one competitor on another to divide a market between them is a unilateral act," Pet. at 15, both because the relationship between petitioner and AT&T was essentially vertical in nature, and because, in all events, the

lower court did not treat the alleged market restriction as a product of unilateral action.[4]

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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[4] There is no conceivable merit to petitioner's suggestion, Pet. at 15 n.6, that the decision below conflicts with *Twombly* v. *Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, *Bell Atlantic Corp.* v. *Twombly*, __ U.S. __, 126 S. Ct. 2964 (2006). The Third Circuit did not even mention, let alone rely on, the requirements of Rule 8 in affirming the dismissal of petitioner's antitrust claims.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

Petitioner's corporate disclosure statement was set forth at page *iii* of its Petition for a Writ of Certiorari, and there are no amendments to that statement.

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Respondent AT&T Corp. ("AT&T") argues against issues that are not raised by the Petition for Certiorari.

A. Petitioner Does Not Challenge The Third Circuit's Decision With Respect To The Issue Of "Participating Carrier." Rather, JMC Submits That Whether PGE Was Or Was Not A "Participating Carrier" Is Irrelevant To The Issue Whether AT&T Breached The Tariff When It Did Not Use "AT&T Facilities" As The Tariff Stated.

AT&T argues in its opposition brief in support of the Third Circuit's ruling that Pacific Gateway Exchange ("PGE"), the sub-tier carrier that AT&T used to transport petitioner JMC Telecom, LLC's ("JMC") customers' calls, was not an "other participating carrier," as that term has been defined by the FCC. Opp. Br. at 5, 9. JMC does not, however, challenge that ruling by its Petition. Whether PGE was an undisclosed "other participating carrier" is irrelevant to JMC's argument that AT&T breached the filed tariff when it used PGE's telecommunications facilities instead of the AT&T facilities it expressly represented in the tariff would be used.

Instead, JMC argues that, in § 2.2.5 of its Filed Tariff #1, AT&T committed to utilize its own telecommunications service – and not PGE's – when it wrote into the tariff: "the Customer [JMC] may inform its subscribers that calls placed using the AT&T Prepaid Card account number will be carried over *AT&T's facilities*." (Emphasis added.) Pet. at 2. In its decision, the Third Circuit appeared to understand this: "JMC asserts that, pursuant to . . . AT&T Tariff No. 1, AT&T would be the exclusive provider of the services needed to complete calls using the cards." App. A at 3a. And, "JMC claims that AT&T breached the tariff by not serving as the exclusive provider of services to the Philippines and but [sic] instead by relying on Pacific [PGE]." App. A at 12a-13a. Nonetheless, the Third Circuit rejected JMC's argument that AT&T had breached the tariff

because, according to the Court, a "claim . . . for quality of service . . . is barred by the filed rate doctrine." App. at 16a.[1]

The Third Circuit's decision was predicated on *AT&T v. Cent. Off. Tel., Inc.*, 524 U.S. 214 (1998), which it understood to "exclude claims of insufficient and poor-quality service." App. A at 11a (*citing Central Office*, 524 U.S. at 233.).

JMC's claim that AT&T breached the tariff is based upon the commitment made by AT&T to JMC in § 2.2.5 of the Filed Tariff to the effect that JMC could inform its customers that calls made with JMC's prepaid phone cards would be carried over AT&T's facilities. Instead, the calls were carried over PGE's facilities, and most of them never went through.[2] JMC respectfully submits that *Central Office* does not prohibit a claim relating to quality of service if the claim is predicated on the breach of an express undertaking in the tariff, and the Supreme Court should correct the Third Circuit's misunderstanding concerning the reach of the holding in *Central Office*.

AT&T argues that it could not be expected – presumably notwithstanding its representation in § 2.2.5 in the Filed Tariff – to use AT&T service exclusively because AT&T had to "route[] the call to another carrier for completion in that foreign country."

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1. At that point in its decision, the Third Circuit speaks in terms of an oral representation to provide exclusive AT&T service. JMC agrees that an oral representation would be barred by the filed rate doctrine; but the Court's holding is clear that the filed rate doctrine barred JMC's claim, not because, as the Court mistakenly assumed, AT&T's promise was oral, but because "such a claim is one for quality of service and is barred by the filed rate doctrine." *Id.*

2. As stated in its opposition brief in the Third Circuit, AT&T repeats its complaint that JMC's argument with respect to § 2.2.5 of the Filed Tariff was not raised below and is, therefore, waived. Opp. Br. at 9, n. 3. As JMC pointed out in its Reply Brief in the Third Circuit, the argument was made to the District Court, even though the Court failed to address it in its decision. JMC Reply Br. 4, n. 2 (citing Appellant's Supplemental Appendix at 3-4).

Opp. Br. at 3. In its Opposition Brief, AT&T describes PGE as "the local Philippine carrier AT&T had contracted with to complete calls in that country." *Id.* That is incorrect and, although the District Court initially accepted this factual assertion by AT&T, the Third Circuit corrected the error.[3] App. A at 13a. In short, the Third Circuit found that PGE was not a local carrier in the Philippines, contrary to what the District Court found, but had instead picked up JMC's customers' calls in the United States and used PGE facilities as the international telecommunications service to transport the calls overseas, contrary to what AT&T had committed in the Tariff to do. Nevertheless, the Third Circuit felt constrained from providing JMC relief because the Court believed that *Central Office* prohibits claims relating to quality of service.[4]

In its decision, the Third Circuit restated what has become an all-too-common refrain in filed rate doctrine cases:

> Although the filed rate doctrine produces harsh results in this case as alleged, such equitable concerns have been rejected by the Supreme Court. *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 128, 110 S. Ct. 2759, 111 L. Ed. 2d 94 (1990) (noting

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3. The District Court had said, "Here, PGE did not provide international direct dial service to customers, but rather provided local connecting service in the Philippines to AT&T." App. C at 33a. The Third Circuit disagreed and correctly found that PGE was not a local Philippines carrier, but instead provided AT&T with "'international direct dial voice, fax or data communication.' Simply put, the International Services Termination Agreement is not reconcilable with the District Court's rationale," as the Court stated. App. A at 13a.

4. Although AT&T continues to mischaracterize PGE as a Philippines carrier, it nonetheless acknowledged for the first time that its use of PGE was the cause of the damage that resulted ultimately in the destruction of JMC's business: "The call completion difficulties petitioner's end-users experienced resulted from AT&T's use of one such low-cost carrier in the Philippines, Pacific Gateway Exchange ('PGE')." Opp. Br. at 3.

> that "[d]espite the harsh effects of the filed rate doctrine, we have consistently adhered to it."). This is true regardless of AT&T's ulterior motives. *See Cent. Off. Tel.*, 524 U.S. at 223.

App. A at 12a, n. 11.

JMC now asks the Supreme Court, not to entertain prohibited "equitable concerns," but to permit JMC to enforce the tariff to which AT&T bound itself to the same extent that AT&T was permitted to enforce the tariff against JMC. That doing so will have the salutary effect of producing an equitable result is not an unimportant consequence.

JMC respectfully submits that it is important for the Supreme Court to clarify whether a breach of tariff claim which relates to the quality of service that is promised in a tariff is barred by *Central Office*.

B. JMC Never "Told The Third Circuit That It Was A 'Wholesaler' And 'Distributor' Of AT&T's Service," As AT&T Asserts. Rather, JMC Has Always Maintained That AT&T And JMC Competed Against Each Other At The Same Level.

AT&T is demonstrably incorrect in stating that JMC was "a novice company" in marketing prepaid calling cards (Opp. Br. at 2) at the time that AT&T approached JMC to sell JMC AT&T's telecommunications services for JMC's cards. Indeed, it was AT&T who was the novice in the international prepaid phone card business and JMC which had established a successful niche in the maritime market by selling phone cards to itinerant seamen through ships' chandlers. A market that was estimated in 1998 as capable of generating sales of at least $180,000,000 per year. JMC Br. at 8-9 (JMC App. 368; 546-47; 556; 713-19; 728-29; 759-60; 872; 1423-24; 1432).

AT&T is demonstrably wrong in its assertion that JMC has admitted it was a "'wholesaler' and 'distributor' of AT&T's

service." Opp. Br. at 10. Paragraphs 2, 3 and 6 of JMC's counterclaim, upon which AT&T relies, do not so state.

- Paragraph 2 states: "JMC's primary business was the design, marketing and selling or prepaid telephone calling cards."
- Paragraph 3 states: "Among other things, AT&T is engaged in the business of providing telecommunications network services to companies that sell prepaid telephone cards."
- Paragraph 6 states: "On or about September 11, 1998, JMC and AT&T entered into a contract pursuant to which AT&T agreed to provide its telecommunications network service for telephone calls made with prepaid calling cards which were to be sold by JMC."

There is nothing in JMC's averments which suggests that JMC was a "wholesaler" or "distributor" of AT&T's service. JMC sold its own prepaid phone cards, which were supposed to have used AT&T's telecommunications facilities to transport the calls overseas. JMC did not wholesale or resell AT&T's telecommunications service and was not an AT&T distributor.

AT&T also misread JMC's brief in the Third Circuit. Page 10 of the brief speaks about *JMC's* distributors, i.e., the ship's chandlers who resold JMC's phone cards. JMC Br. at 9-10. Similarly, page 15 of the brief refers to "international distributor" in the context of a firm which sold phone cards in the international market. The statement was taken from the deposition testimony of AT&T's Chu Chu Kinkley, who grouped JMC with other firms who sold AT&T's own phone card. JMC App. 546-47. Finally, AT&T's reference to page 51 of JMC's brief, wherein JMC referred to "supplier and its distributor," had nothing to do with JMC's relationship to AT&T. It was, rather, a citation to the decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), to support JMC's argument that even in the context of a supplier-distributor relationship, a supplier cannot claim that it acted unilaterally

when it forced its distributor to violate the Sherman Antitrust Act.

JMC was not an AT&T distributor. Rather, it was a direct competitor who sold its "Rring Latitude" card in direct competition against AT&T's prepaid phone card. Those were the unambiguous allegations in JMC's Counterclaim. JMC App. 255-62. See Pet. at 8-9. Rather than accept JMC's averments as true, as the District Court and Third Circuit were required to under Fed. R. Civ. P. 12 (b) (6) (*Conley v. Gibson*, 355 U.S. 41 (1957)), the lower courts *found* otherwise, concluding that "the relationship was primarily vertical." App. A at 8a.

The facts, as alleged in the counterclaim, support the conclusion that JMC was not a distributor of AT&T, notwithstanding that AT&T provided the telecommunications service for JMC's phone cards. As such, the lower courts should not have dismissed the counterclaim under Rule 12(b)(6) on the grounds the counterclaim failed to allege a horizontal division of customers and markets, a per se violation of the Sherman Act.

C. Contrary To AT&T's Assertion, The Division Of Markets By AT&T And JMC Resulted In A Reduction Of Inter-Brand, Not Intra-Brand Competition.

AT&T argues that *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46 (1990) is "vastly different" from this case because in *Palmer*, the market division that was condemned as a per se violation of the antitrust laws lessened inter-brand competition, whereas, according to AT&T, this case involves intra-brand competition. Opp. Br. at 10-11.[5]

AT&T's conclusion is premised on the false assumption that JMC and AT&T sold the same prepaid phone card. It is undisputed that they did not. The two companies' phone cards

5. Although it was an important part of JMC's argument in the Third Circuit, the Court did not mention *Palmer* in its decision.

were not the same. They did not have the same attributes or pricing and did not even have the same appearance. In fact, whereas AT&T's cards used AT&T's reliable telecommunications facilities, JMC's cards were saddled with PGE's substandard facilities. AT&T never sold JMC's Rring Latitude phone card and JMC never sold AT&T's phone card.

AT&T's argument, which is dependent upon the probity of its argument that JMC was AT&T's distributor, is circular. Whether *Palmer* controls depends on the answer to the second question presented by JMC's Petition:

> Does the Supreme Court's rule that declares a naked restraint of trade in the form of a division of markets between competitors to be a *per se* violation of the antitrust laws apply where one of the competitors supplies a component of the other's product [i.e., the telecommunications service that allows the product to function]?

If the answer to the question is "yes," then *Palmer* clearly applies because the restraint was horizontal and necessarily reduced inter-brand competition.

This question, concerning, as it does, the proper application of *per se* rules of antitrust jurisprudence, is an important one for the Supreme Court to address.

D. The Third Circuit Affirmed The District Court's Dismissal Of JMC's Division Of Markets Claim Wherein The District Court Held There Was Not Concerted Action. The Issue Of Concerted Action Was Necessarily Dependent Upon The Third Circuit's Characterization Of The Market Restraint As Vertical Instead Of Horizontal.

The District Court dismissed JMC's division of markets claim, holding that "when a dealer unwillingly complies with a supplier's demand, no agreement for purposes of § 1 [of the Sherman Act] exists." App. E at 59a (*citing Monsanto v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984). The District Court also relied upon *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) in support of its conclusion that the parties' conduct was vertical and should have been analyzed under rule of reason principles. App. E at 59a. The Third Circuit similarly relied upon *Sharp* in finding that the relationship was vertical and should be analyzed under the rule of reason. App. A at 8a.

The question whether the parties' relationship was that of a supplier and distributor and whether the restraint was, therefore, vertical, is the second question raised by the petition. See above. *Sharp* made clear that determining whether a relationship is vertical or horizontal will be a strong factor in determining whether there was concerted or unilateral action in the imposition of the market restraint and, whether the restraint was, consequently, illegal. *Sharp*, 485 U.S. at 743-47.

The issue of unilateral versus concerted action is dependent on the analysis of vertical versus horizontal restraints.

JMC submits that the Third Circuit's affirmance of the District Court's dismissal of JMC's market division claim was necessarily predicated on both of the District Court's conclusions, i.e. that the relationship was vertical and that it did not involve concerted action. If this Court grants certiorari to consider JMC's second question, it follows that certiorari

should also be granted to consider whether the market restraint involved concerted action. In this regard, JMC had relied upon the Supreme Court's decision in *Perma Life Mufflers*, *supra*, in the proceedings below, but both the District Court and Third Circuit failed to address it.

CONCLUSION

For the reasons stated in the Petition for Certiorari and above, petitioner respectfully submits that its petition should be granted.

Respectfully submitted,

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